SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
MAR 19 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1971

No. 71-1172

UNITED STATES STEEL CORPORATION and
U. S. STEEL HOMES CREDIT CORPORATION,
Petitioners,

vs.

FORTNER ENTERPRISES, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MACDONALD FLINN
14 Wall Street
New York, New York 10005

ALBERT F. REUTLINGER
501 South Second Street
Louisville, Kentucky 40202

WILLIAM H. BUCHANAN
600 Grant Street
Pittsburgh, Pennsylvania 15230

Attorneys for Petitioners

Of Counsel:

WHITE & CASE
MIDDLETON, SEELBACH, WOLFORD,
WILLIS & COCHRAN

INDEX

	PAGE
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement of the Case	4
Reasons for Granting the Writ	6
I—A. The decision below conflicts with this Court's mandate in this case as to the requisite proof of "sufficient economic power" where credit is the tying element in an allegedly *per se* tying violation	6
B. The decision below conflicts with this Court's mandate in this case and its other decisions as to the requisite proof, by the rule-of-reason standard, of any other Sherman Act offense upon Fortner's failure to establish a *per se* tying violation	13
II—The decision below conflicts with the decision of another court of appeals as to the requisite proof of "sufficient economic power" whether the tying element is credit or any other product	18
III—The decision below raises significant and recurring problems of great moment to the general economy concerning supplier financing as affected by the antitrust laws and emphasizes the need for clarification of this Court's prior five-to-four decision, which has occasioned substantial controversy and uncertainty	20

PAGE

Conclusion 22

Appendix A—Opinion of the United States Court of Appeals for the Sixth Circuit A1

Appendix B—Listing of Legal Commentaries Devoted to This Court's Prior Decision in This Case A20

TABLE OF AUTHORITIES

Cases:

Advance Business Systems & Supply Co. v. SCM Corporation, 415 F.2d 55 (4th Cir., 1969), *cert. denied*, 397 U.S. 920 (1970) 18

Afroyim v. Rusk, 387 U.S. 253 (1967) 22

American Tobacco Co. v. United States, 328 U.S. 781 (1946) 17

Cornwell Quality Tools Co. v. C.T.S. Company, Inc., 446 F.2d 825 (9th Cir., 1971), *cert. denied*, —— U.S. ——, 40 U.S. Law Week 3336 (1972) 17

Fortner Enterprises, Inc. v. United States Steel Corp., 293 F. Supp. 762 (W.D.Ky., 1966), *aff'd w/o op.*, 404 F. 2d 936 (6th Cir., 1968), *rev'd*, 394 U.S. 495 (1969) 5

Gold Fuel Service, Inc. v. Esso Standard Oil Co., 306 F.2d 61 (3rd Cir., 1962) 17

Northern Pacific Railway Co. v. United States, 356 U.S. 1 (1958) 14

SEC v. United Benefit Life Insur. Co., 387 U.S. 202 (1967) 22

Swift & Co. v. United States, 196 U.S. 375 (1905) 17

PAGE

Times-Picayune Publishing Co. v. United States, 345 U.S. 594 (1953) 17

United States v. Consolidated Laundries Corp., 291 F.2d 563 (2d Cir., 1961) 17
United States v. Griffith, 334 U.S. 100 (1948) 17
United States v. Yellow Cab Co., 332 U.S. 218 (1947) 17

Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp., 382 U.S. 172 (1965) 17

Statutes:

Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§1 and 2 3–4

IN THE

Supreme Court of the United States

October Term, 1971

No.

UNITED STATES STEEL CORPORATION and
U. S. STEEL HOMES CREDIT CORPORATION,

Petitioners,

vs.

FORTNER ENTERPRISES, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this action on December 16, 1971.

Opinion Below

The opinion of the Court of Appeals, reported at 452 F.2d 1095, appears in Appendix A. No opinion was rendered by the District Court for the Western District of Kentucky.

Jurisdiction

The judgment of the Court of Appeals for the Sixth Circuit was entered on December 16, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. When a supplier's credit subsidiary extends financing conditioned upon the purchase of the supplier's products, is there a *prima facie* case requiring submission to a jury

(a) of an alleged *per se* tying violation where the fungible tying element (credit or money) is claimed to be unique solely because offered on cheaper, more favorable terms than available elsewhere, but where there is a failure to show that those terms reflect any unique economic advantage over other lenders because, as the Court of Appeals found, the record is barren of evidence that (1) legal prohibitions or (2) higher costs and lower profitability barred any competing lenders from granting credit on the same or equally cheap terms, or

(b) of any other alleged Sherman Act violation, measured by the rule-of-reason, where, *inter alia*,

(1) the record fails to show that the challenged financing was offered on predatory, below-cost terms;

(2) the record fails to show that other lenders were unable to give equally favorable terms (in fact, they were stimulated to do so);

(3) the record fails to show that the challenged financing was conditioned upon exclusive dealing (in fact, even the credit granted could be refinanced to allow the purchase of competing products);

(4) the record fails to show that the supplier's competitors were foreclosed because of the challenged financing (in fact, while total sales nationally and those of competitors with larger sales increased, the supplier's sales declined from 1.4% to .8% of the total);

(5) the record fails to show that the relevant market should be limited to a single city and to the selfsame products as those of the supplier; and

(6) the record fails to show that the supplier had any specific intent to achieve monopoly or posed a dangerous probability of doing so?

2. Does mere proof of the acceptance of a tie-in by customers establish the standard of "sufficient economic power" essential to the *per se* tying rule?

Statutes Involved

The applicable statutes are Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§1 and 2. They provide in pertinent part:

> "Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal • • •."

"Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor * * *."

Statement of the Case

In this treble damage antitrust action brought under Section 4 of the Clayton Act (14 U.S.C. §14), violations of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§1, 2) are alleged in that United States Steel Corporation and its wholly owned subsidiary, U. S. Steel Homes Credit Corporation, forced the respondent and others to purchase prefabricated houses from U. S. Steel's Homes Division as a condition to obtaining financing. (JA 38-76, 103-32*)

Fortner Enterprises claims that it and others were "coerced" by "economic necessity" to buy houses, later found to be defective, at artifically high prices because the land financing furnished by the Credit Corporation was not available from any other source on as favorable terms (*i.e.*, loans equivalent to 100% of the cost of the land). Such a "tying arrangement," respondent argues, constituted a *per se* violation of the Sherman Act. Alternatively, if it is not a *per se* offense, the arrangement is alleged nonetheless to have violated Sections 1 and 2 of the Act.

At an earlier stage of this litigation, the District Court for the Western District of Kentucky granted summary

* "JA" references are to portions of the record printed in the parties' Joint Appendix filed with the Court of Appeals and transmitted to the Clerk of this Court. Throughout this petition, all emphasis in quoted passages has been added unless otherwise noted.

judgment dismissing the complaint. (293 F. Supp. 762) The Court of Appeals for the Sixth Circuit affirmed without opinion. (404 F.2d 936) This Court granted certiorari and held, in a five-to-four decision, that Fortner was entitled to a trial of its claims.* (No. 306, Oct. Term, 1968)

Following a full trial, both sides moved for directed verdicts. Without opinion or any statement of its reasons, the District Court directed a verdict for respondent on the liability issues. (JA 196-99, 1016-58) Instructed that single damages could not exceed $250,000, the jury returned a verdict of $93,200 before trebling. (JA 196-99, 1063-72, 1076-77)

Petitioners limited their appeal to the liability issues, contending that respondent had failed to prove a *prima facie* case of any Sherman Act violation and, alternatively, that it was error to direct a verdict for the respondent. The Court of Appeals held that respondent had "made out a *prima facie* case of Sherman Act violations," but it reversed the judgment of the trial court insofar as it granted Fortner's motion for a directed verdict. The case was remanded for a new trial before a jury solely on the question of whether there has been a violation of Sections 1 and 2. (App. A, pp. A4, A18-A19)

For the purposes of this petition, the opinion of the Court of Appeals sufficiently outlines the transactions between the parties. (App. A, pp. A6-A8) In addition, respondent's principal testified that he would not have purchased the Homes Division's houses without the 100% land loans by the Credit Corporation and that such financing

* *Fortner Enterprises, Inc.* v. *United States Steel Corp.*, 394 U.S. 495 (1969).

was not available from any other source. The president of the largest mortgage company in Louisville testified that this was true at the time of the loans to respondent. He testified that it was not until almost a year after the second loan to respondent that his company, other mortgage companies, and building and loan associations in Louisville began offering 100% land financing in response to the competition of the Credit Corporation and other manufacturers of prefab homes or their affiliates. Respondent asked the trial court to take judicial notice of legal prohibitions upon the granting of 100% land financing by national banks and federally insured savings and loan associations. Finally, respondent's construction superintendent testified as an expert that in his opinion the price of the Homes Division houses exceeded by some $450 the cost of a local competitor's prefab house or of conventional building materials, both supplemented to the extent necessary to make them comparable.*

Reasons for Granting the Writ

I

A. The decision below conflicts with this Court's mandate in this case as to the requisite proof of "sufficient economic power" where credit is the tying element in an allegedly *per se* violation.

Justice Black's majority opinion in this case carefully analyzed the standard of "sufficient economic power" essential to the *per se* tying rule. Dealing first with the situation where the tying product itself is unique, the opinion reiterated the teaching of *United States* v. *Loew's Inc.*, 371

* JA 227, 421-22, 432, 821-23, 830-41, 839-44, 847, 868-69.

U.S. 38, 45 (1962): "Even absent a showing of market dominance, the crucial economic power may be inferred from the tying product's desirability to consumers or from uniqueness in its attributes." (394 U.S. at 503)

Specifying some degree of "appreciable economic power" over the tying element as necessary, however, the majority equated the requisite power with that enjoyed by a seller of a product sufficiently unique and desirable to force at least an "appreciable number of buyers" to accept a "higher price because of their stronger preferences for the product." Rather than forcing those buyers to accept a premium price, Justice Black explained, such a seller can choose instead to force them to accept a tying arrangement, thereby forgoing his abnormal profits in the tying market to distort or "prevent free competition for their patronage in the market for the tied product." A seller shown to have the ability to choose between those two alternatives has "sufficient economic power" to invoke the *per se* tying rule.*

* "Market power is usually stated to be the ability of a single seller to raise price and restrict output, for reduced output is the almost inevitable result of higher prices. * * *. Market power is therefore a source of serious concern for essentially the same reason, regardless of whether the seller has the greatest economic power possible or merely some lesser degree of *appreciable economic power*. In both instances, despite the freedom of some or many buyers from the seller's power, other buyers—whether few or many, whether scattered throughout the market or part of some group within the market—*can be forced to accept the higher price because of their stronger preferences for the product, and the seller could therefore choose instead to force them to accept a tying arrangement that would prevent free competition for their patronage in the market for the tied product.* Accordingly, the proper focus of concern is whether the seller has the power to raise prices, or impose other burdensome terms such as a tie-in, with respect to any appreciable number of buyers within the market." (394 U.S. at 503-504)

Justice Black dealt also with the "somewhat confusing" case where the tying product itself is not unique or distinctive and sufficiently desirable to command a premium price but where the seller's economic power arises instead from his unique "cost advantage in producing it"—an advantage permitting him (like the seller of a distinctive product who is able to command a premium price) either to realize higher than normal profits or to distort competition in some other market by imposing a tie-in:

> "Uniqueness confers economic power only when other competitors are in some way prevented from offering the distinctive product themselves. Such barriers may be legal, as in the case of patented and copyrighted products, *e.g., International Salt; Loew's,* or physical, as when the product is land, *e.g., Northern Pacific.* It is true that the barriers may also be economic, as when competitors are simply unable to produce the distinctive product profitably, but the uniqueness test in such situations is somewhat confusing since the real source of economic power is not the product itself but rather the seller's cost advantage in producing it." (394 U.S. at 505, n. 2)

This Court recognized that money is a non-distinctive, fungible commodity* and, therefore, that there could be nothing unique about the petitioners' financing other than its "cheap terms" or low cost to the borrower.** Con-

* Justice Black stated that "money is a fungible commodity— like wheat * * *." (394 U.S. at 509) Justice White asserted that "money [is] the most fungible item of trade since it is by definition an economic counter * * *. The [tying] market here is money, a completely fungible item." (*Id.* at 515, 519)

** See 394 U.S. at 504 ("* * * no such financing was available to his corporation on any such cheap terms from any other source * * *."); *id.* at 505 ("They could well mean that U. S. Steel's subsidiary Credit Corp. had a unique economic ability to provide 100% financing at cheap rates."); *id.* at 515 ("There was nothing unique about U. S. Steel's money except its low cost to [plaintiff].").

sequently, the majority held that economic power over the tying element could be established only by proof (1) that the Credit Corporation had a cost advantage and higher profitability not enjoyed by other lenders or (2) that other lenders were prohibited by law from offering equally cheap financing. (394 U.S. at 505-506, 509)

In applying the standards of the *per se* rule to this case, the Court of Appeals found that the issue "raised regarding the second standard, that of 'sufficient economic power,' is far more troublesome * * *." The court emphasized its difficulty with this issue, stating that "In other Supreme Court cases * * *, this question did not pose the same factual uncertainty as here." (App. A, p. A11). Significantly, the Sixth Circuit concluded that this Court, in reviewing this case, had "refused to specify precisely what proof would satisfy the [market power] standard of the *per se* rule." (App. A, p. A11). Petitioners submit that this reading of Justice Black's opinion is mistaken and resulted in the erroneous conclusion below that respondent was entitled to go to a jury on the issue of economic power.

The Court of Appeals believed that the two sources of economic power over credit specified by Justice Black were not the only possible sources of such power. The court stated:

> "It was apparently the view of the [Supreme] Court that * * * [Fortner] must prove that the 'unique and unusual' terms offered by the Credit Corporation reflected some unique economic advantage over its competitors. The Court pointed to *two possible* sources of such advantage: (1) competitors in the credit market might be legally precluded from offering credit on such terms; and (2) the Credit Corporation might enjoy some cost advantage not shared by potential competi-

tors in the relevant credit market in Louisville. *The Court did not preclude the possibility of other sources of leverage.*" (App. A, p. A13)

This Court's opinion and economic logic, however, compel the conclusion that a lender could have economic power in a credit market populated by many lenders only if he enjoyed one or both of the advantages articulated by Justice Black.

The Sixth Circuit's misconception of this Court's mandate on the proof of power over credit is evidenced by its failure to explain how Fortner had established a *prima facie* case as to this standard. That failure is underlined by the fact that the Court of Appeals offered the trial judge no guidance as to what instructions to give the jury. To the contrary, rather than leaving to the jury merely disputed fact issues,* its normal province, the opinion below appears to thrust upon the jury the essentially insuperable burden of deciding matters of the utmost economic complexity for laymen, *i.e.*, what evidence from a voluminous antitrust record is germane to determining whether the Credit Corporation had power over financing not enjoyed by competing lenders.**

* On the issue of the Credit Corporation's economic power over credit, for the purposes of this petition petitioners do not dispute any fact of record upon which respondent has relied, read in the light most favorable to and drawing every reasonable inference for respondent.

** The Court of Appeals stated, in part: "We have not undertaken in this opinion to discuss all of the items of evidence bearing upon the question of economic power. * * * Upon remand, these items [urged by Fortner] and the entire range of evidence bearing upon this issue should be submitted to the jury. * * * On this aspect of the case, the issue for the jury is whether the Credit Corporation, in the language of *Northern Pacific Railway Co., et al.* v. *United States, supra*, had 'sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product. * * *' Admittedly this is a standard which must vary in application from case to case, but *the jury should be free to determine the issue on the basis of the entire evidence* (some of which we have commented upon), *free from the limitations of an arbitrary definition.*" (App. A, p. A19, n.4)

In addition to the failure to explain how a *prima facie* case had been established, the decision below is anomalous in that the court's own factually correct analysis of the record demonstrates affirmatively that respondent did not make out a *prima facie* case of economic power within the standards mandated by this Court. When it turned to the only two possible sources of power over credit, as specified by Justice Black, the Court of Appeals concluded that the record was devoid of evidence as to either.

First, the court found that apart from legal restrictions against 100% land loans by national banks and federally insured savings and loan associations the record is "barren of any evidence that other lending institutions in the Louisville area were subject to the same prohibition, such as mutual savings banks, credit unions, pension funds, finance companies, mortgage companies, building and loan associations, and insurance companies." Further, even as to the only two types of lenders legally barred, the Court of Appeals correctly concluded, "Proof alone that an institution is prohibited from granting 100% land financing would therefore seem to be insufficient to establish the fact that it is unable to offer terms embodying other elements which would make its financing equally favorable or advantageous to the borrower."* (App. A, pp. A13-A14)

* That credit or financing is cheaper or more favorable than available elsewhere cannot be determined by considering only the percentage or ratio of the amount loaned in relation to the security or collateral. Other relevant factors include the rate of interest charged, whether or not the lender discounts the amount loaned or charges service or other fees, and the maturity and terms of repayment. For example, a 100% loan against security valued at $1,000 but discounted 10% (*i.e.*, reducing the amount actually taken by the borrower to $900) and at 10% interest repayable in 12 equal monthly installments is not cheaper or more attractive than a 90% loan against the same security, without discount or fee and at 5% interest repayable at the end of 12 months.

Second, as to any cost advantage over other lenders, the Court of Appeals found initially that "the Credit Corporation, while not operating at a loss, had comparatively low profits. Its total net profits in 1960 and 1961 were $52,197.00 and $59,053.00, respectively. In those same years its earnings in relation to net worth were 4.5% and 4.8%. At least two local mortgage companies in Louisville had higher earnings in relation to net worth in both of these years." (App. A, p. A15) Even more important, however, and conclusive by itself that respondent was not entitled to go to a jury on this issue was the court's indisputable finding that:

> "There is no showing in the record that there were lenders in or out of Louisville having higher costs or lower profitability than the Credit Corporation." (*Id.*)

Moreover, apart from this failure of proof, the record shows affirmatively and without contradiction that other lenders were not precluded from matching the Credit Corporation's terms by any supposed cost advantage it might have. Thus, based upon the uncontradicted testimony of respondent's own witnesses that the Credit Corporation and others stimulated a competitive response,* the Court of Appeals noted "that soon after plaintiff negotiated its financing terms with the defendants for 100% financing, traditional lending agencies in Louisville indeed began offering loans upon the same basis."** (App. A, p. A14)

* JA 821-23, 839-40, 842-44, 847.

** The Court of Appeals discussed various facts and contentions urged by Fortner as proof of economic power (*e.g.*, the rates at which the Credit Corporation borrowed the funds it loaned, the Homes Division's guaranty of the loans extended to Fortner and certain others, and the allegedly higher-than-competitive prices of the houses pur-

That respondent failed to make even a *prima facie* showing that the Credit Corporation enjoyed "sufficient economic power" over credit is not surprising. If in fact petitioners had any economic power over credit, they would hardly have limited the Credit Corporation's financing activities just to supporting the modest volume of business in prefabricated houses done by U.S. Steel's Homes Division.* Rather U.S. Steel would have devoted to the business of financing more of its assets than the $1 million capital and $1 million loan it extended to the Credit Corporation and would have made credit available far more generally in order to reap the higher-than-normal profits which are the hallmark of the economic power essential to proof of a *per se* tying violation.

B. The decision below conflicts with this Court's mandate in this case and its other decisions as to the requisite proof, by the rule-of-reason standard, of any other Sherman Act offense upon Fortner's failure to establish a *per se* tying violation.

As in the case of the alleged *per se* tying violation, the Court of Appeals did not explain how respondent had made out a *prima facie* case of any other Sherman Act violation:

chased by Fortner). The court found that none of these necessarily proved economic power but concluded that nevertheless they should be submitted to a jury. (App. A, pp. A15-A17) As analyzed in the briefs filed by petitioners below and transmitted to this Court, all of those facts, considered individually or in the aggregate and read in the light most favorable to respondent, fail to make out a *prima facie* case of economic power over credit, because the record, read in its entirety, lacks any evidence that the Credit Corporation had any unique cost advantage and higher profitability or that other lenders were legally barred from offering financing on identical or equally cheap terms.

* In 1960, the Homes Division sold 1,793 houses for $6,746,353. In 1961, it sold 1,342 houses for $5,051,992. (JA 1199)

"While the plaintiff claims a violation of Sec. 2 of the Sherman Antitrust Act, we do not deem it necessary to discuss the evidence on this question since it consists substantially of the same evidence offered in support of the alleged Sec. 1 violation. We are satisfied that the total evidence, measured in terms of the principles enunciated by the majority opinion of the Supreme Court on the first appeal, make it inappropriate for the Court to approve a directed verdict for either party in this case on the liability issues under Secs. 1 and 2 of the Sherman Act." (App. A, pp. A17-A18)

Patently the Sixth Circuit misconstrued this Court's decision on this aspect of the case, too. This Court enunciated no principles other than in connection with Fortner's *per se* tying contentions. To the contrary, Justice Black's majority opinion states, "We need not consider, however, whether [Fortner] is entitled to a trial on this more general theory [*i.e.*, the more thorough rule-of-reason standard], for it is clear that [Fortner] raised questions of fact which, if proved at trial, would bring this tying arrangement within the scope of the *per se* doctrine." (394 U.S. at 500-501)

Respondent's failure to prove even a *prima facie* case of any *per se* violation placed a far heavier burden upon it to establish a *prima facie* case of any other violation. As this Court emphasized in *Northern Pacific Railway Co.* v. *United States*, 356 U.S. 1, 5 (1958), where the *per se* rule is applicable it "* * * avoids the necessity for an incredibly complicated and prolonged economic investigation * * * to determine at large whether a particular restraint has been unreasonable * * *." Similarly, Justice Black in this case stated that absent proof of a *per se* tying violation, where

"no specific showing of unreasonable competitive effect is required," a plaintiff could prevail only by proving, "on the basis of a more thorough examination of the purposes and effects of the practices involved, that the general standards of the Sherman Act have been violated." (394 U.S. at 498, 500) Because Fortner relies, as the court below noted, upon "substantially * * * the same evidence offered in support" of its Section 1 *per se* tying allegations, its claims based upon the rule-of-reason standard fall *a fortiori*.

The record demonstrates that, contrary to the rule-of-reason standard mandated by this Court in the event of a failure to establish a *per se* tying violation, respondent has failed to make out a *prima facie* case of any other Sherman Act violation. Tying arrangements are deemed evil only when the seller enjoys power in the tying market and, by imposing the tie, uses that power to distort competition on the merits in the tied market. Absent economic power over credit (as to which Fortner has failed to make a *prima facie* case), financing claimed to be unique solely because offered on cheaper terms is nothing more than a promotional device enhancing competition in the tied product market. The price of the tied product, here houses, is for all effects and purposes reduced when the tying credit is sold at lower than prevailing prices. Justice Black and the majority of this Court recognized that, like the offer of any other tying product on advantageous terms, "advantageous credit terms may be viewed as a form of price competition in the tied product * * *." They concluded that a seller can achieve that objective as long as he offers "fringe benefits over which he has no economic power." (394 U.S. at 508 and n. 5)

Respondent can not claim that either the Credit Corporation or U.S. Steel used their assets to engage in predatory conduct by offering credit at below-cost prices, because the record is devoid of such evidence. There is no proof that other lenders were unable to offer terms equally favorable to those of the Credit Corporation. Instead the record shows, without contradiction, that normal lending sources even in Louisville responded to the Credit Corporation's 100% land financing by matching it. It can not be argued, therefore, that the Homes Division's competitors in the house market are foreclosed since (even if they are unable or choose not to grant such financing) their customers can turn to independent financing sources for the same or comparable terms.

The respondent was required to place Homes Division houses only upon the lots financed by the Credit Corporation and only as long as the money furnished to acquire and develop those lots was not repaid.* There is no evidence or even claim that petitioners conditioned their financing more broadly upon the purchase of their houses exclusively. While the lots financed by the Credit Corporation were to be used (unless the money advanced was repaid) only for the Homes Division's houses, Fortner and all others were free to use their own money or that borrowed from any other lender to buy as many houses as they chose from U.S. Steel's competitors. Further, there is no evidence that any competitor in the housing market failed to sell a single house or that any buyer other than possibly Fortner failed to purchase any houses from competitors because of petitioners' financing. The sole evidence is that the Homes Division had been losing and continued to lose

* As the Court of Appeals found, "* * * Fortner was advised that he was free to refinance the Credit Corporation's loan and proceed to obtain houses from other sources." (App. A, p. A8)

sales (dropping from 1.4% to .8% of national prefab sales) while the total number of prefab houses sold by all manufacturers increased more than 20% and the sales of all but one of the Homes Division's larger competitors significantly increased.*

Moreover, Fortner neither argued nor does the record show what the relevant market is for measuring any allegedly adverse competitive effect or monopoly (*e.g.*, no basis is shown for limiting the geographic dimensions of the market to Louisville or its product definition to prefab houses in any particular price category as opposed to all houses). Finally, as to the Section 2 claim, unlike the offense of monopolization, a conspiracy to monopolize (*i.e.*, to acquire monopoly power—the power to control price and exclude competition) requires not just the "deliberateness" to do the acts challenged but a specific intent to accomplish the unlawful result of monopolization, as in driving competitors out of business, together with the dangerous probability of achieving monopoly in the relevant market.** The record here is barren of any such evidence.

---

* By comparison, competing prefab manufacturers sold the following number of houses (JA 884-85, 1199):

Year	*National Homes*	*Swift Industries*	*Inland Homes*	*Kingsbury Homes*	*Homes Division*
1960	16,804	2,500	2,281	1,401	1,793
1961	18,276	3,000	2,253	2,150	1,342

** *American Tobacco Co.* v. *United States*, 328 U.S. 781, 786, 789 (1946); *United States* v. *Yellow Cab Co.*, 332 U.S. 218, 229-230 (1947); *Swift & Co.* v. *United States*, 196 U.S. 375, 396 (1905); *Times-Picayune Publishing Co.* v. *United States*, 345 U.S. 594, 626 (1953); *United States* v. *Griffith*, 334 U.S. 100, 105 (1948); *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965); *Cornwell Quality Tools Co.* v. *C.T.S. Company, Inc.*, 446 F.2d 825, 832-833 (9th Cir., 1971), *cert. denied*, —— U.S. ——, 40 U.S. Law Week 3336 (1972); *United States* v. *Consolidated Laundries Corp.*, 291 F.2d 563, 573 (2d Cir., 1961); *Gold Fuel Service, Inc.* v. *Esso Standard Oil Co.*, 306 F.2d 61, 64 (3rd Cir., 1962).

In summary, considering the entire record in the light most favorable to respondent, it has failed, contrary to the conclusion of the court below, to establish a *prima facie* case of any Sherman Act violation.

II

The decision below conflicts with the decision of another court of appeals as to the requisite proof of "sufficient economic power" whether the tying element is credit or any other product.

The decision below creates a direct conflict with the decision of another court of appeals as to how "sufficient economic power" may be proved. Fortner relied below upon *Advance Business Systems & Supply Co.* v. *SCM Corporation*, 415 F.2d 55 (4th Cir., 1969), *cert. denied*, 397 U.S. 920 (1970), claiming that on the question of economic power the verdict directed in its favor was justified without more on principles asserted in that decision.

There the Fourth Circuit construed this Court's decision in this case as standing for the proposition that "* * * the 'sufficient economic power' test of *per se* illegality is satisfied when it appears that the seller has the power to 'impose other burdensome terms such as a tie-in, with respect to any appreciable number of buyers within the market.' "*

* Petitioners submit that the Fourth Circuit failed to read the language it quoted in the context of Justice Black's detailed discussion of the fact that market power generally involves a seller's ability to raise the price of his tying product at least to some customers because they regard that product as sufficiently unique and desirable to pay a premium over the price of what they deem to be the nearest substitute. (394 U.S. at 503-504) In omitting the crucial sentence preceding its quotation out of context from Justice Black's opinion, the Fourth

(415 F.2d at 68) The Fourth Circuit, in the context of the Clayton Act, also held that "a seller's successful imposition of a tying arrangement on a substantial amount of commerce may be taken as proof of his economic power over the tying product." (*Id.* at 62) In the decision below, the Sixth Circuit (correctly, petitioners believe) has rejected the Fourth Circuit's conclusion that "the acceptance of the tie-in by customers without more is proof of economic power." (App. A, p. A18)

The conflict between the Fourth and Sixth Circuits is significant because the answer to the question whether market power can be found from the mere fact that customers accept a tie-in encompasses all tying arrangements, not merely those where credit or financing is the tying element. While the Sixth Circuit's negative answer to that question is in favor of petitioners, resolution of the conflict by this Court is necessary to insure proper application of the *per se* tying rule in the future since the Fourth Circuit's view in effect eliminates the need to prove even the most minimal degree of power over the tying product.

The Fourth Circuit's view not only destroys the rationale for the existence of the *per se* tying rule (*i.e.*, that power enjoyed in the tying product market should not be extended to restrain trade in another market by insulating the tied

---

Circuit failed to note his statement that if the seller had the power to raise the price of his tying product and "could therefore choose instead to force [buyers] to accept a tying arrangement," then the requisite economic power would be shown and, "Accordingly, the proper focus of concern is whether the seller has the power to raise prices, or impose other burdensome terms such as a tie-in, with respect to any appreciable number of buyers within the market." (*Id.* at 504) Justice Black did not say or imply that acceptance of a tie-in by customers proves economic power.

product from competition "on the merits") but also disregards the fact that buyers, as in this case, will accept a tie-in when the seller offers the tying product on cheaper or more favorable terms as a "loss leader" to promote the sales of his tied product. As this Court held, the lower price of the tying product, without more, fails to prove any power in the tying market, and without such power a promotional tie-in of this type is tantamount to a reduction in the price of the tied product and constitutes lawful price competition in that market. (394 U.S. at 505, 508)

III

The decision below raises significant and recurring problems of great moment to the general economy concerning supplier financing as affected by the antitrust laws and emphasizes the need for clarification of this Court's prior five-to-four decision, which has occasioned substantial controversy and uncertainty.

The importance of this case far transcends just the resolution of the dispute between the parties here. The majority and dissenting opinions of this Court when it first reviewed this matter all recognized that financing conditioned upon the purchase of a lending seller's goods is a widespread and significant phenomenon in the nation's economy, one which has promoted competition and the advent of small, independent businesses, not just in connection with the burgeoning franchise phenomenon but elsewhere as well. (394 U.S. at 507, 511, 515-516) Justice White stated:

> "A seller who is willing to take credit risks which no one else finds acceptable is simply engaging in the

hard and risky competition which it is the policy of the Sherman Act to encourage. And if he may not do so, then those businesses and entrepreneurs who depend for their survival and growth or for the initiation of new enterprises on the availability of credit financing from sellers may well fail for lack of credit availability from other sources." (*Id.* at 517)

Justice Fortas said:

> "It is common in our economy for a seller to extend financing to a distributor or franchisee to enable him to purchase and handle the seller's goods at retail, to rent retail facilities, to acquire fixtures or machinery for service to customers in connection with distribution of the seller's goods, or, as here, to prepare the land for and to acquire and erect the seller's houses for sale to the public. * * * Arrangements of this sort run throughout the economy. They frequently, and perhaps characteristically, represent an indispensable method of financing distributive and service trades. * * *" (*Id.* at 524-525)

As the court below noted, "The majority and minority opinions in this case have stimulated much general interest and wide scholarly examination." (App. A, p. A12) A partial listing of the many legal commentaries which have attempted to analyze this Court's prior decision is set forth in Appendix B. Those commentaries have reached sharply conflicting conclusions as to the meaning of the decision and what is necessary to prove a *per se* tying violation or other antitrust offense where supplier financing is challenged.

In addition, the decision has attracted widespread attention in the business community and has been character-

ized (incorrectly, petitioners believe) as substantially inhibiting if not precluding supplier financing and credit extended, at least if on favorable terms, to dealers and customers.* In fact, even the dissenting opinions expressed concern as to the possibly damaging impact of the Court's decision, Justice White noting that "The logic of the majority opinion * * * casts great doubt on credit financing by sellers" and Justice Fortas stating that the effect of the decision "may be vast and destructive," amounting to a use of "the antitrust laws themselves as an instrument in restraint of competition." (394 U.S. at 516, 524-525)

Petitioners submit that it is imperative that this Court review the decision below in view of the importance to the general economy of clear and correct guidelines for the proper application of the antitrust laws both in the vital area of supplier financing and in the broader realm of tying arrangements in general. Particularly is that true inasmuch as the decision below purports to be premised upon the prior decision of this Court—a decision which appears to be in need of clarification (see *SEC* v. *United Benefit Life Insur. Co.*, 387 U.S. 202, 207 (1967)) and which, decided three years ago by a five-to-four vote, has been a source of controversy and confusion ever since (see *Afroyim* v. *Rusk*, 387 U.S. 253, 255-256 (1967)).

* See, for example, the editorial entitled "Review and Outlook: A Peculiar Way to Preserve Competition," *The Wall Street Journal*, April 21, 1969, p. 18.

Conclusion

For these reasons and because the record, after a full trial on the merits, contains all of respondent's evidence so that the retrial ordered below will afford, at best, no better vehicle for review and clarification of the standards mandated by this Court and may result in an erroneous verdict by a jury improperly given issues of law rather than fact to resolve, a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit.

Respectfully submitted,

MACDONALD FLINN
14 Wall Street
New York, New York 10005

ALBERT F. REUTLINGER
501 South Second Street
Louisville, Kentucky 40202

WILLIAM H. BUCHANAN
600 Grant Street
Pittsburgh, Pennsylvania 15230

Attorneys for Petitioners

Of Counsel:

WHITE & CASE
MIDDLETON, SEELBACH, WOLFORD,
WILLIS & COCHRAN

APPENDICES

APPENDICES

Appendix A

Opinion of the United States Court of Appeals for the Sixth Circuit

No. 71-1194

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

FORTNER ENTERPRISES, INC.,
Plaintiff-Appellee,

v.

UNITED STATES STEEL CORPORATION and
UNITED STATES STEEL HOMES CREDIT CORPORATION,
Defendants-Appellants.

APPEAL from the United States District Court for the Western District of Kentucky, Louisville Division

---

Decided and Filed December 16, 1971.

Before: MILLER and KENT, Circuit Judges, and CECIL, Senior Circuit Judge.

MILLER, Circuit Judge. This is the second appeal in this private antitrust action.[1] At the first trial the district court granted summary judgment for the defendants, holding that petitioner had failed to raise any question of fact as to a possible violation of the antitrust laws. *Fortner Enter-*

1. The action was instituted by Fortner Enterprises, Inc. against U. S. Steel Corporation and its wholly owned subsidiary, the U. S. Steel Homes Credit Corporation, pursuant to Secs. 1 and 2 of the Sherman Act, 15 U.S.C., Secs. 1 and 2, seeking treble damages and injunctive relief against further violations.

prises, Inc. v. *U. S. Steel Corp., et al.*, 293 F.Supp. 762 (1966). The judgment was affirmed by this Court without opinion but the Supreme Court in a 5-4 decision, holding on the facts set forth in the record as it was constituted at that time, that summary disposition was improper and the action should go to trial, reversed the judgment of affirmance of this Court and remanded the action with directions that it proceed to trial. *Fortner Enterprises, Inc.* v. *United States Steel Corp.*, 394 U. S. 495 (1969). The majority and minority opinions in this case have stimulated much general interest and wide scholarly examination.[2] Upon remand, the district judge, after a trial before a jury which occupied approximately one month, sustained the plaintiff's motion for a directed verdict and overruled the defendants' similar motion. He submitted to the jury only the question of damages which should be awarded in favor of the plaintiff. The jury returned a verdict in the amount of $93,200.00

2. We are aware of the controversy which surrounds the tying arrangement cases generally, a controversy involving differences over both economic policy (See, e.g. Markovitz, *Tie-ins, Reciprocity, and the Leverage Theory*, 76 Yale L.J. 1397 (1967); Bowman, *Tying Arrangements and the Leverage Problem*, 67 Yale L.J. 19 (1957); and the proper application of legal doctrine (See, e.g. Kauper, *The Warren Court and the Anti-trust Laws: Of Economics, Populism and Cynicism*, 67 Michigan L.Rev. 325 (1968); Pearson, *Tying Arrangements and Antitrust Policy*, 60 NW.L.Rev. 626 (1965). We have studied with interest and special care the scholarly comments which the Supreme Court's opinions in this case have generated, finding especially useful a note: *The Logic of Foreclosure: Tie-in Doctrine after Fortner* v. *U. S. Steel*, 79 Yale L.J. 86 (1969). See also, Dam, *Fortner Enterprises* v. *United States Steel: "Neither A Borrower, Nor A Lender Be,"* 1969 Supreme Court Review 1; *Recent Trends in Supreme Court Antitrust Decisions: Commentary — Past, Present and Future*, 38 Antitrust Law Journal 602 (1969); Note, *Credit As a Tying Product*, 69 Col.L.Rev. 1435 (1969); and The Supreme Court, 1968 Term, 83 Harv.L.Rev. 235.

which was trebled by the court. Motions for judgment n.o.v. and, alternatively, for a new trial were denied and judgment for plaintiff was entered on November 23, 1970. The defendants raise no question on the present appeal as to damages, having elected to limit the appeal to the issue of liability under the Sherman Act. Their insistence is that the court erred in directing a verdict in favor of the plaintiff and that, on the contrary, the court should have sustained the defendants' motion for a directed verdict. It is argued, in the alternative, that at least the case was one for the jury and that the action should be remanded for a new trial before a jury on the question of liability only, the damage issue already having been decided by a jury.

In its original and amended complaints the plaintiff charged that the defendants had engaged in a contract, combination, and conspiracy to restrain trade and to monopolize trade in the sale of prefabricated houses. Alleging that there was a continuing agreement between the defendants to force the plaintiff and other corporations and individuals, as a condition to availing themselves of the services of the Credit Corporation, to purchase at artificially high prices only U. S. Steel Homes, plaintiff specifically claimed that in order to obtain loans totaling over two million dollars from the Credit Corporation for the purchase and development of certain land in the Louisville, Kentucky, area, it had been required to agree, as a condition of the loans, to erect a prefabricated house manufactured by U. S. Steel Corporation on each of the lots purchased with the loan proceeds. It was further claimed

that the prefabricated materials were then supplied by U. S. Steel at unreasonably high prices and proved to be defective and unusable, thus requiring the expenditure of additional sums and delaying the completion date for the development.

To determine whether a directed verdict is appropriate the governing principle is that a verdict may properly be directed only when, without weighing the credibility of the witnesses, there can be but one reasonable conclusion as to the verdict. Where there is conflicting evidence or insufficient evidence to make only a "one way" verdict possible, a directed verdict is improper. *Brady* v. *Southern Railway Co.*, 320 U. S. 476, 479-80 (1943); 5A *Moore's Federal Practice* ¶50.02[1] pp. 2321, 2. An appellate court too is bound to view the evidence in the light most favorable to the party against whom the motion for a directed verdict is made and give him the advantage of every fair and reasonable inference that the evidence may justify. *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962); 5A *Moore's Federal Practice*, ¶50.02[1] pp. 2326, 7.

Examining the record on the basis of these standards and in the light of the Supreme Court's opinion in this case, we find that while the plaintiff made out a prima facie case of Sherman Act violations the evidence and permissible inferences therefrom are in such conflict that neither party was entitled to a directed verdict. Instead the question of liability should have been submitted to the jury as well as the question of damages. Both the plaintiff and defendants to support their respective positions rely upon the Supreme Court's opinion in this case on the first appeal. In doing so they quote selective portions from the opinion which

tend to indicate some support for the particular views which they espouse. It becomes necessary, therefore, in the resolution of this appeal to examine the Supreme Court's opinion to discover its real thrust and impact in the context of the facts of the present litigation as they were developed at the second trial.

At the outset it is well to bear in mind that on the first appeal the Supreme Court was not considering the alleged antitrust violations in the light of a full trial on the merits. Rather the specific question before it was a procedural one, i.e., whether it was appropriate for the district court on the basis of the facts as they had been developed from affidavits and pretrial procedures to dispose of the case by summary judgment. That the Court did not intend to indicate any view as to what the trier of the facts should find from the evidence was expressly pointed out when the Court said that it might turn out that the plaintiff's allegations will not be sustained when the case goes to trial. "It may turn out," as the Court further stated, "that the arrangement involved here serves legitimate business purposes and that U. S. Steel's subsidiary does not have a competitive advantage in the credit market. But on the record before us it would be impossible to reach such a conclusion as a matter of law, and it is not our function to speculate as to the ultimate findings of fact." It is also of significance that the Court indicated its reluctance to dispose of antitrust cases by summary procedure. Addressing itself specifically to the use of summary judgment procedure in antitrust cases, the Court stated: "Since summary judgment

in antitrust cases is disfavored, *Poller*,[3] *supra*, the claims of uniqueness in this case should be read in the light most favorable to petitioner." (Plaintiff).

It was developed at trial that the Homes Division of U. S. Steel manufactures component parts for prefabricated houses, selling what it terms home packages in various states. The sales are made through dealer-builders such as the plaintiff. U. S. Steel's subsidiary, the Credit Corporation, was founded in 1954 as a wholly owned subsidiary for the purpose of providing financial assistance to the Homes Division's dealer-builders who were unable to obtain suitable financial assistance from more conventional sources. In effect the services of the Credit Corporation were a "tool" to assist the Homes Division in the sale of its houses. Beginning in 1958 the policies of the Credit

---

3. In *Poller* v. *Columbia Broadcasting Co., Inc., et al.*, 368 U.S. 464, 473 (1962), the Court in stating that summary procedures should be used sparingly in complex antitrust litigation used language which we think is of significance in determining the appropriateness of directing a verdict in this case rather than submitting the issues to a jury for evaluation:

> We look at the record on summary judgment in the light most favorable to Poller, the party opposing the motion, and conclude here that it should not have been granted. We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of "even handed justice."

Although summary judgment and a directed verdict are procedurally distinguishable both substitute the court for the jury as the fact-finder. Some of the considerations dictating a reluctance to resort to summary judgment in complex antitrust cases are equally applicable to the direction of a verdict.

Corporation were changed, when a program of "special assistance" was initiated whereby credit was made available in high risk situations on particularly reasonable terms to Homes Division dealer-builders. As reflected by the minutes of the U. S. Steel finance committee, the purpose of the policy was to enable Homes Division "to attain a minimum of 1800 units in 1959." To reach this goal and such additional distribution as may be feasible the Credit Corporation was directed to make loans to dealers without conformity to conventional or conservative patterns "but within the bounds of prudent business judgment." It was contemplated that Homes Division would underwrite such loans, guaranteeing losses to a defined extent.

In 1959 it came to the attention of the Homes Division that certain land in an existing subdivision in the Louisville, Kentucky, area might be available for development. The land was owned by a corporation in which A. B. Fortner, a successful and well-known real estate developer, held a 50% interest. Later in that year U. S. Steel initiated discussions with Fortner with the idea that the property might be an attractive vehicle for it to enter the Louisville prefabricated housing market. Following negotiations an agreement was reached whereby Fortner's wholly-owned corporation, Fortner Enterprises, Inc., would become a franchised dealer-builder of the Homes Division product. It was part of the agreement that the Credit Corporation would extend credit to the plaintiff corporation for the development conditioned upon the construction on each of the 187 lots purchased by the plaintiff [of] a prefabricated house from the Homes Division of U. S. Steel. The initial

loan was $2,055,300.00. Interest at the rate of six per cent per annum, plus a service charge of one-half of 1%, was to be charged. Of the total commitment, $373,200.00 was to cover the cost of acquisition and development of the lots; the remainder was to cover the purchase and construction of the houses. The land loan equaled 100% of the cost of the land acquisition and development.

There was evidence that the plaintiff experienced difficulties with the U. S. Steel products, including the omission of parts and the delivery of defective parts which necessitated additional work. Substantial complaints were made with respect to the Homes Division products from home owners who had purchased the homes from Fortner. Yet during this period Fortner requested additional financing for the purchase and development of land on which Homes Division houses were to be placed. Thus, on August 2, 1961, Fortner executed a land and mortgage note in the amount of $59,000.00 and a construction note in the amount of $403,400.00. Having continued to experience difficulties with the prefabricated houses and having run out of cash, Fortner requested that he be relieved of the requirement that the financing be used for the construction of Homes Division houses. This request was refused but Fortner was advised that he was free to refinance the Credit Corporation's loan and proceed to obtain houses from other sources. Thereafter, in July 1962 he instituted the present action.

In *Northern Pacific Railway Co., et al.* v. *United States,* 356 U.S. 1 (1958), the Supreme Court defined the tying arrangement device, identified its evils and stated the prerequisites for per se illegality in the following fashion:

Appendix A

For our purposes a tying arrangement may be defined as an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier. Where such conditions are successfully exacted competition on the merits with respect to the tied product is inevitably curbed. Indeed "tying agreements serve hardly any purpose beyond the suppression of competition." *Standard Oil Co. of California* v. *United States*, 337 U. S. 293, 305-306. They deny competitors free access to the market for the tied product, not because the party imposing the tying requirements has a better product or a lower price but because of his power or leverage in another market. At the same time buyers are forced to forego their free choice between competing products. For these reasons "tying agreements fare harshly under the laws forbidding restraints of trade." *Times-Picayune Publishing Co.* v. *United States*, 345 U. S. 594.

They are unreasonable in and of themselves whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product and a "not insubstantial" amount of interstate commerce is affected. *International Salt Co.* v. *United States*, 332 U. S. 392. Cf. *United States* v. *Paramount Pictures*, 334 U. S. 131, 156-159; *United States* v. *Griffith*, 334 U. S. 100. Of course where the seller has no control or dominance over the tying product so that it does not represent an effectual weapon to pressure buyers into taking the tied item any restraint of trade attributable to such tying arrangements would obviously be insignificant at most. As a simple example, if one of a dozen food stores in a community were to refuse to sell

> flour unless the buyer also took sugar it would hardly tend to restrain competition in sugar if its competitors were ready and able to sell flour by itself. 356 U. S. at 5, 6 and 7.

Once it is established that a tying arrangement exists, it must be determined whether a "not insubstantial" amount of commerce is affected by the tie and whether the tier has "sufficient economic power" in the market for the tying product.

We need not deal at length with whether a "tying arrangement" exists in this case, nor whether the amount of commerce affected is "not insubstantial." The Court rejected Mr. Justice Fortas' argument that this was not a "tying arrangement":

> We agree with the District Court that the conduct challenged here primarily involves a tying arrangement of the traditional sort. 394 U.S. at 498.

On the matter of whether the volume of commerce allegedly foreclosed was "not insubstantial" the Court stated:

> The complaint and affidavits filed leave no room for doubt that the volume of commerce aliegedly foreclosed was substantial. It may be true, as respondents claim, that petitioner's annual purchases of houses from U. S. Steel under the tying arrangement never exceeded $190,000, while more than $500,000 in annual sales was involved in the tying arrangement held illegal in *International Salt, but we cannot agree with respondents that a sum of almost $200,000 is paltry or "insubstantial."* 394 U.S. 501, 2. (Emphasis added).

The issues raised regarding the second standard, that of "sufficient economic power," is far more troublesome, but we think that so far as the present record reflects, the issue should have gone to the jury. Of this issue, Mr, Justice Black stated that "* * * the pleadings and affidavits sufficiently disclose the *possibility* of market power over borrowers in the credit market to entitle petitioner to go to trial on this issue." (Emphasis added.)

In other Supreme Court cases in which a "tying arrangement" has been found to be illegal per se under the Sherman Act, this question did not pose the same factual uncertainty as here. Sufficient economic power was shown in *International Salt Co.* v. *United States,* 332 U.S. 392 (1947), by the simple fact that the tying product was patented; in *United States* v. *Loew's, Inc.,* 371 U.S. 38 (1962), the tying product was copyrighted; and in *Northern Pacific Railway Co., et al.* v. *United States,* 356 U.S. 1 (1958), it was the physical uniqueness of the land which constituted the tying product.

Here no such talisman exists. The Court rejected Fortner's "apparent argument that market power can be inferred simply because the kind of financing terms offered by a lending company are 'unique and unusual.'" Having done so, however, the Court refused to specify precisely what proof would satisfy the standard of the per se rule. Yet the Court was not entirely silent as to the sort of proof which could be weighed in determining the existence of the necessary "economic power" in the tying product.

Under the antitrust statutes, the tying cases are fundamentally based on the notion that competitive advantage in

one market (that of the tying product), whether the result of a patent, copyright, physical uniqueness, a cost advantage or whatever else might serve as a source of leverage, should not be translateed into a competitive advantage in another distinct market (that of the tied product).

The focus of our present inquiry is whether the Credit Corporation possessed leverage in the credit market (the "tie" here being the extension of credit) sufficient to induce buyers in the market for prefabricated houses (the "tied" product) to accept a less competitive product.

It is clear that such leverage need not be of sufficient magnitude to constitute monopoly power or even market dominance. As stated in the majority opinion in this case:

> The standard of "sufficient economic power" does not, as the District Court held, require that the defendant have a monopoly or even a dominant position throughout the market for the tying product. Our tie-in cases have made unmistakably clear that the economic power over the tying product can be sufficient even though the power falls short of dominance and even though the power exists only with respect to some of the buyers in the market. See, *e.g.*, *International Salt; Northern Pacific; United States* v. *Loew's Inc.*, 371 U.S. 38 (1962). 394 U.S. at 502, 3.

And in *United States* v. *Loew's Inc.*, 371 U.S. 38 (1962), the Court stated:

> • • • Even absent a showing of market dominance, the crucial economic power may be inferred from the tying product's desirability to consumers or from uniqueness in its attributes. 371 U.S. at 45.

Appendix A

As we have pointed out, the Court expressly rejected Fortner's "apparent" argument that the uniqueness of the loan, namely the fact that one hundred per cent land financing may have been unavailable elsewhere in Louisville at the time the loan commitment was made, alone constitutes proof of "sufficient economic power." It was apparently the view of the Court that, while plaintiff need not prove dominance in the credit market on the part of the Credit Corporation, it must prove that the "unique and unusual" terms offered by the Credit Corporation reflected some unique economic advantage over its competitors. The Court pointed to two possible sources of such advantage: (1) competitors in the credit market might be legally precluded from offering credit on such terms; and (2) the Credit Corporation might enjoy some cost advantage not shared by potential competitors in the relevant credit market in Louisville. The Court did not preclude the possibility of other sources of leverage.

Turning to the evidence with respect to these two possible sources of economic power suggested by the Supreme Court, judicial notice may be taken of the fact that national banks may make loans only on improved real estate, and that federally insured savings and loan associations are limited to loans up to 70% of the real estate as developed. Yet the record appears to be barren of any evidence that other lending institutions in the Louisville area were subject to the same prohibition, such as mutual savings banks, credit unions, pension funds, finance companies, mortgage companies, building and loan associations, and insurance companies. A jury should be permitted to evaluate the

significance of the freedom of such traditional lending sources from any restriction against extending 100% financing in deciding whether competitors in the Louisville credit market were precluded from offering credit on such terms. On the same facet of the case there was testimony at trial that soon after plaintiff negotiated its financing terms with the defendants for 100% financing, traditional lending agencies in Louisville indeed began offering loans upon the same basis. Such fact, while not conclusive of the situation as it existed at the time plaintiff's loans were consummated, could be appropriately considered by a jury in reaching the ultimate conclusion whether the Credit Corporation had economic power in the credit market so as to come within the per se rule. Further, while the plaintiff offered some evidence that 100% financing was not generally available on the Louisville market at the time of its financing with the Credit Corporation, it must be conceded that the amount of the loan as a percentage of the collateral or security is only one element in determining its advantage to a borrower. Other relevant factors, as appropriately pointed out by the defendants, include the rate of interest charged, whether the lender discounts the amount loaned or charges service or other fees, and the maturity and terms of repayment. Proof alone that an institution is prohibited from granting 100% land financing would therefore seem to be insufficient to establish the fact that it is unable to offer terms embodying other elements which would make its financing equally favorable or advantageous to the borrower.

As to the second factor suggested by the majority opinion (that of a possible cost advantage) we again find that the record is open to varying interpretations, inferences and conclusions. It is true that the Credit Corporation as a wholly owned subsidiary of U. S. Steel was able to obtain funds for lending purposes at the prime rate, and that U. S. Steel necessarily stood behind repayment of any funds which the Credit Corporation was required to borrow. Also, as a subsidiary of U. S. Steel, it may be inferred that the Credit Corporation was not expected to maximize profits but to assist in the sales of the Homes Division houses. During the relevant period no dividends were paid to the parent corporation and there is no evidence that the Credit Corporation competed aggressively as a lender. These considerations could conceivably be taken by a jury as some evidence that the Credit Corporation was able to make loans at a level of risk unacceptable to most lending institutions. On the other hand, the record justified the conclusion that the Credit Corporation, while not operating at a loss, had comparatively low profits. Its total net profits in 1960 and 1961 were $52,197.00 and $59,053.00, respectively. In those same years its earnings in relation to net worth were 4.5% and 4.8%. At least two local mortgage companies in Louisville had higher earnings in relation to net worth in both of these years. There is no showing in the record that there were lenders in or out of Louisville having higher costs or lower profitability than the Credit Corporation. Of course, the Credit Corporation, as the evidence demonstrated, incurs the usual operating costs of a lending institution, including clerical and management

salaries, rent, charges for office equipment, supplies, services, taxes, etc. Moreover, it would be relevant for the jury to take into account that the Credit Corporation operates at some disadvantage in that traditional lending agencies doing business in a community on a continuing basis serve a concentrated geographic area having a larger and more diversified clientele of borrowers permitting them to achieve cost savings and efficiencies not available to a lender engaged in a business like that of the Credit Corporation. It is also possibly true that traditional lending institutions are in position to spread their risks and costs both over a larger volume of business and over different areas of the economy.

The Credit Corporation obtained its funds primarily from banks. In 1961 it had borrowed from banks approximately ten to fourteen million dollars. For the borrowing of these funds it paid the prime rate. On the funds which it borrowed from U. S. Steel it paid the prime rate plus one per cent. It may be that the jury could infer from the record that the Credit Corporation incurred higher costs in acquiring money to lend than the costs incurred by commercial banks, savings and loan associations and insurance companies. In this connection it must be remembered that we are here dealing not with advantages which a finance subsidiary may give to its parent in relation to competitors in the parent's line of business, but with the question whether the finance subsidiary has a unique advantage over financial institutions and other competitors in the lender's market.

Plaintiff also points to the fact that the Homes Division guaranteed or underwrote the land financing extended to plaintiff and certain others. It is argued that this fact demonstrates economic power over credit. This conclusion, in our view, is not necessarily true. On the contrary, it may simply be a factor which demonstrates that it was necessary for the Credit Corporation to be subsidized against any loss incident to the greater cost and risk involved. Doubtless other lending institutions in the relevant market were of sufficient strength and soundness to inspire confidence in their loan commitments.

Plaintiff's reference to the Supreme Court majority's statement in regard to the Homes Division houses being priced some $400.00 higher than comparable houses would not appear to have any conclusive effect on the question which we are now considering. It is clear from the opinion that Mr. Justice Black and those justices who joined him in the majority opinion did not reach any definitive conclusion as to the effect of this factor. On the contrary, as pointed out, they merely said that a substantial price differential "may suggest" or is not inconsistent with the "possibility of market power." The evidence on this question should be weighed by the jury and its proper probative value determined.

While the plaintiff claims a violation of Sec. 2 of the Sherman Antitrust Act, we do not deem it necessary to discuss the evidence on this question since it consists substantially of the same evidence offered in support of the alleged Sec. 1 violation. We are satisfied that the total evidence, measured in terms of the principles enunciated by the

majority opinion of the Supreme Court on the first appeal, make it inappropriate for the Court to approve a directed verdict for either party in this case on the liability issues under Secs. 1 and 2 of the Sherman Act.

In *Advance Business Systems & Supplies Co.* v. *SCM Corporation*, 415 F.2d 55 (4th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970), the Court, as the plaintiff argues, interpreted *Fortner* as holding that "* * * the 'sufficient economic power' test of per se illegality is satisfied when it appears that the seller has the power to 'impose other burdensome terms such as a tie-in with respect to any appreciable number of buyers within the market.'" Plaintiff in its brief relies upon this interpretation and insists that the directed verdict in its favor was justified on the basis of this interpretation of *Fortner* by the Fourth Circuit. As we read the majority opinion in *Fortner*, the holding was that a tying arrangement achieves an unlawful restraint when "the seller can exert some power over some of the buyers in the market." The majority opinion did not hold that the acceptance of the tie-in by customers without more is proof of economic power. If the majority had intended to indicate that acceptance of a tie-in by an appreciable number of customers is sufficient proof of the requisite economic power, it would have been sufficient for Mr. Justice Black to have said so and thus to avoid the exhaustive treatment which he gave to the question of economic power in the tying product set forth in other portions of his opinion.

The judgment of the district court insofar as it sustained the plaintiff's motion for a directed verdict is accordingly reversed, and the action is remanded to the district court

for trial before a jury on the question of liability under Secs. 1 and 2 of the Sherman Act. The judgment is affirmed insofar as it denied the defendants' motion for a directed verdict.[4]

---

4. We have not undertaken in this opinion to discuss all of the items of evidence bearing upon the question of economic power. Plaintiff relies heavily, for example, upon evidence tending to indicate that the Credit Corporation was both able and willing to lend to high risk borrowers at a rate of interest commensurate with a much lower level of risk, i.e., to offer credit on terms otherwise unavailable at the time. The guarantees and the Credit Corporation's relationship to U. S. Steel are pointed to as possible sources of leverage. Upon remand, these items and the entire range of evidence bearing upon this issue should be submitted to the jury. Insofar as the complaints allege a per se violation due to a tie-in, assuming that the evidence developed is substantially the same as that offered at the first trial, the trial judge may appropriately instruct the jury that the tie-in itself has been established as a matter of law, and that the amount of commerce affected is "not insubstantial." On this aspect of the case, the issue for the jury is whether the Credit Corporation, in the language of *Northern Pacific Railway Co., et al.* v. *United States, supra*, had "sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product * * *." Admittedly this is a standard which must vary in application from case to case, but the jury should be free to determine the issue on the basis of the entire evidence (some of which we have commented upon), free from the limitations of an arbitrary definition.

Appendix B

Listing of Legal Commentaries Devoted to This Court's Prior Decision in This Case

Baker, *Another Look At Franchise Tie-Ins After Texaco and Fortner,* 14 Antitrust Bull. 767 (1969)

Dam, *Fortner Enterprises* v. *United States Steel: "Neither A Borrower, Nor A Lender Be,"* 1969 Supreme Court Rev. 1

Comment, *Anti-Trust Tying Arrangements,* 9 Washburn L. J. 282 (1970)

Handler, *Antitrust: 1969,* 55 Cornell L. Rev. 161 (1970)

Nelson, *Tying Arrangements Reconsidered: A Review of Fortner Enterprises, Inc.* v. *U. S. Steel Corp., et al.,* 15 Antitrust Bull. 7 (1970)

Note, *Antitrust Law—Tying Agreements, The "Per Se" Rule, And Credit,* 23 Southwestern L. J. 907 (1969)

Note, *Antitrust Law—Tying Arrangements And Per Se Illegality,* 38 U. of Mo. at Kansas City L. R. 483 (1970)

Note, *Antitrust Laws—When A Not Insubstantial Portion Of Interstate Commerce Is Affected, The Conditioning Of Uniquely Advantageous Financing Terms Upon The Purchase Of Prefabricated Houses Raises A Jury Question On The Issue Of An Illegal Tying Arrangement,* 47 Texas L. Rev. 1449 (1969)

Note, *Antitrust—Tying Arrangements—A Re-examination Of The Per Se Rule And Identification Of Tying Arrangements,* 48 N. Carolina L. Rev. 309 (1970)

Note, *Corporate Tying Arrangements Illegal Per Se When the Tying Product Is "Unique" and the Dollar-Volume Of The Tied Product Is Not Merely DeMinimis,* 21 Syracuse L. Rev. 245 (1969)

Appendix B

Note, *Credit As A Tying Product*, 69 Col. L. Rev. 1435 (1969)

Note, *The Logic of Foreclosure: Tie-In Doctrine After Fortner* v. *U. S. Steel*, 79 Yale L. J. 86 (1969)

Note, *Per Se Illegality Of Tying Arrangements Involving Credit Financing*, 50 Boston U. L. Rev. 125 (1970)

Note, *The Supreme Court, 1968 Term*, 83 Harv. L. Rev. 7, 235 (1969)

Panel Discussion, *Recent Trends In Supreme Court Antitrust Decisions: Commentary—Past, Present and Future*, 38 Antitrust L. J. 602, 614 (1969)

Tingle, *Financial Assistance As A Tying Product—Fortner Enterprises* v. *U. S. Steel*, 25 Business Lawyer 121 (1969)

LIBRARY
SUPREME COURT, U. S.
APR 11

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 71-1172

UNITED STATES STEEL CORPORATION and U. S. STEEL HOMES CREDIT CORPORATION, - - - - - - - - - Petitioners,

versus

FORTNER ENTERPRISES, INC., - - Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

KENNETH L. ANDERSON
WOODWARD, HOBSON & FULTON
1805 Kentucky Home Life Building
Louisville, Kentucky 40202

A. SCOTT HAMILTON, JR.,
HAMILTON, HOPSON, LONG & ROGERS
310 West Liberty Street
Louisville, Kentucky 40202

Counsel for Respondent

WESTERFIELD-BONTE CO., INC., 619 W. KENTUCKY, LOUISVILLE, KY.

INDEX

PAGE

COUNTERSTATEMENT OF QUESTIONS PRESENTED 1-2

STATEMENT OF THE CASE 2

THE FACTS 3-11

REASONS FOR DENIAL OF THE WRIT 11-25

I. A. The Decision Below Does Not Conflict With This Court's Mandate in the Case as to the Requisite Proof of "Sufficient Economic Power" Where Financing of a Particular Type Is the Tying Element in an Allegedly Per Se Violation 11-16

B. The Sixth Circuit Decision Does Not Conflict With This Court's Mandate in This Case and Its Other Decisions as to the Requisite Proof Required for a Non Per Se Violation of Section 1 or Section 2 of the Sherman Act 16-22

II. Although the Decision Below May Conflict With the Decision of Another Court of Appeals, This Is Not a Sufficient Ground to Grant the Petition in This Case Since the Conflict Does Not Adversely Affect Petitioners in This Case 22-23

III. The Decision Below Does Not Raise Significant and Recurring Problems of Great Moment to the General Economy 23-25

CONCLUSION 26

APPENDIX A—Opinion of the United States Court of Apeals for the Sixth Circuit A1-A19

TABLE OF AUTHORITIES

Cases: PAGE

Advance Business Systems & Supply Co. v. SCM Corporation, 415 F. 2d 55 (4th Cir., 1966), cert. denied, 397 U. S. 920 (1970) 22

American Tobacco Co. v. United States, 328 U. S. 781 (1946) 21

Fortner Enterprises, Inc. v. United States Steel Corp., 293 F. Supp. 762 (W.D. Ky., 1966), aff'd w/o op., 404 F. 2d 936 (6th Cir., 1968), rev'd, 394 U. S. 495 (1969) 11, 16, 23

International Salt Co. v. United States, 332 U. S. 392, 92 L. Ed. 20, 68 S. Ct. 12 24

G. H. Miller & Co. v. United States, 260 F. 2d 286 (7th Circuit), Cert. denied 359 U. S. 907, 3 L. Ed. 2d 572, 79 S. Ct. 582 12

Northern Pacific Railway Co. v. United States, 356 U. S. 1 (1958) 17, 24

United States v. Consolidated Laundries Corp., 291 F. 2d 563 (2d Cir., 1961) 21

United States v. United States Steel Corp., 1969 C.C.H. Trade Cases, § 72,826, p. 87,025 15

United States v. Yellow Cab Company, 332 U. S. 218 (1947) 20–21

Statutes:

Sections 1 and 2 of the Sherman Act, 15 U.S.C. 1 and 2 ..... 21–22, 24

Other:

Volume 32A Corpus Juris Secundum, §1016, pp. 626, 627 12

55 Cornell L. Rev. 161 (1970) 24

Recent Trends in Supreme Court Antitrust Decisions: Commentary—Past, Present and Future, 38 Antitrust L. J. 602, 616-618 (1969) 24

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 71-1172

UNITED STATES STEEL CORPORATION and
U. S. STEEL HOMES CREDIT CORPORATION, - *Petitioners,*

v.

FORTNER ENTERPRISES, INC., - - *Respondents.*

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. When the Sixth Circuit Court of Appeals decides that there were fact issues concerning "sufficient economic power" over the tying element in a per se Sherman Act Section 1 case, overuling the contentions of Petitioners and Respondent that they were entitled to directed verdicts, is this a basis for granting a Petition for Writ of Certiorari?

2. When the Sixth Circuit Court of Appeals decides that there were fact issues concerning general allegations of violation of Sections 1 and 2 of the Sherman Act, is this a basis for granting a Petition for Writ of Certiorari?

3. Where there is a conflict between Circuits, is this ground for granting a Petition for Writ of Certiorari when Petitioner could not obtain any affirmative relief as a result?
4. Is so-called confusion in the business community unsupported by the record a basis for granting a Petition for Writ of Certiorari?

STATEMENT OF THE CASE

Petitioners' Statement of the Case gives only a brief summary of the proceedings and facts below. Respondent feels that more extensive exposition of the facts is necessary and will set them forth below.*

Respondent would first like to bring to the Court's attention the fact that Petitioners made alternative arguments before the Sixth Circuit Court of Appeals. They first argued that their motion for directed verdict should have been sustained. They argued in the alternative that if they were not entitled to a directed verdict then there were issues of fact for the jury and the Trial Court erred in directing a verdict for Respondent on liability. The Sixth Circuit held that there were fact issues concerning the "economic power" issue and reversed as Petitioners sought. Petitioners are thus urging in their Petition to the Supreme Court that the Sixth Circuit erred in granting the relief Petitioners themselves sought.

We now turn to the pertinent facts developed at the trial.

*"JA" references are to portions of the record printed in the parties' Joint Appendix filed with the Court of Appeals. For ready reference, the opinion of the Court of Appeals appears in Appendix A.

THE FACTS

Land was available in southern Jefferson County, Kentucky, in an existing subdivision in 1959 and 1960, and this land was owned by a corporation in which A. B. Fortner had an interest. The Homes Division of United States Steel Corporation became interested in the project and in an effort to induce sales of their prefabricated house packages they had the Credit Corporation enter into negotiations with plaintiff for the purpose of offering financial assistance for land acquisition and development and construction funds for purchase and erection of the houses. The Credit Corporation offered plaintiff 100% of the cost of the land and cost of development (JA 214-215), provided that it agree to purchase the United States Steel house packages for use in the subdivision (JA 221). This offer of financing was unique, unusual and attractive to plaintiff. Mr. Fortner testified that he would not have agreed to purchase the U. S. Steel homes but for the financing offered (JA 227).

As a result of the offer, notes, a mortgage and a loan agreement were executed in October, 1960 (JA 44-74) in favor of the Credit Corporation. The notes were based on 6% interest and a fee or discount of one-half of 1%. The Loan Agreement specifically contained the tie-in provision requiring the plaintiff to purchase the house packages from United States Steel Corporation and erect them on the lots in the subdivision (JA 47). There is no dispute but that this was a tie-in agreement for the benefit of the third party defendant United States Steel Corporation.

These loans were offered to plaintiff under the so-called special financing program of the Credit Corporation and this program is explained in a letter from the president of Homes Division to the Assistant General Solicitor of United States Steel Corporation (PX 238; JA 1275-1276), as follows:

> "Beyond the 'regular' program of financing assistance offered to qualified builders and negotiated by the Credit Corporation there exists a program of 'special' assistance which provides a greater amount of interim financing participation in selected markets with selected dealers. Fortner represents one of the latter. In these cases our sales department in an attempt to obtain distribution in a new market or to supplement distribution in an existing market, will discuss the possibility of a building program using U. S. Steel Homes with a dealer who is believed to have the necessary qualifications to be successful. Frequently the builder states a need for substantial interim financing to support the program and after commercial evaluation and a satisfactory preliminary check of credit and reputation, a recommendation is forwarded to U. S. Steel Homes Credit Corporation that negotiations be undertaken to arrive at a satisfactory basis for financing assistance consistent with the conditions which exist in each instance. In certain cases where Credit Corporation states that the amount of assistance provided in relation to the value of the security is beyond the normal limits of a purely financial transaction, Homes Division underwrites the financial transaction, Homes Division

underwrites the arrangement so as to protect Credit against potential losses. Our agreement with Fortner is in this category."

Fortner Enterprises, Inc., obtained from the defendant, United States Steel and the Credit Corporation during the course of discovery numerous documents. Those pertinent to Fortner's case was introduced into evidence and constitute compelling and unrefuted evidence against the defendants.

The Homes Division of United States Steel made a presentation to the Finance Committee of United States Steel at its January 12, 1954, meeting (PX 1-M; JA 1085). That recommendation was that a financing corporation be established to provide *construction money* and to *originate mortgages* for resale to investors (JA 1088-1089). It was specifically understood at that time that the proposed finance corporation ". . . will not be used as a means to force sales to dealer-builders" (Paragraph 2(b) PX 1-M; JA 1090). The Credit Corporation was established as a result of that authorization and presentation.

There was a change of policy in 1958. The Finance Committee Minutes (PX 1-W; JA 1095-1096), in order to enable the Homes Division ". . . to attain a minimum distribution of 1,800 units in 1959, and such aditional distribution as may be feasible . . ." authorized and directed the Credit Corporation to make loans to dealers to effectuate that purpose ". . . without conformity with conventional or conservative patterns but within the bounds of prudent business judgment;" provided that the Homes Division under-

write and guarantee losses to a defined extent. This was the "special" financing program instituted by the Credit Corporation and it was continued through at least 1961 (JA 1098).

A formal Underwriting Agreement was entered into between Homes Division and Credit Corporation dated March 30, 1962, covering those loans made under the special financing program which were still in existence as of that date and setting forth the procedure for the making of loans under the special financing program (PX 237; JA 1268-1272). The procedure set forth therein was for Homes Division to request Credit Corporation to make a loan as a "financial risk" and if Credit Corporation refused then Homes Division would "direct" Credit Corporation to make a loan as a "commercial risk" in reliance upon the underwriting of the loan by Homes Division (JA 1271).

The attachment to that Underwriting Agreement (JA 1272-1274), lists the loans guaranteed by Home Division and this included the land acquisition loans to Fortner. It also listed the other land acquisition loans guaranteed by Homes Division under the special financing program according to the testimony of W. H. Lang, President of the Credit Corporation (JA 976 and 980). Twenty-nine of the forty-three loans guaranteed in that Underwriting Agreement involved overall loans in excess of $250,000.00 (JA 980; JA 1194-1196). All of the loans on the attachment to the Underwriting Agreement covered the high risk type loans under the special financing program (JA 981).

The defendants admitted that Credit Corporation's loan commitments for 1960 were $22,625,805.00; for 1961 were $19,342,612.00 and for 1962 were $19,283,544 and that all such loan commitments with certain minimal exceptions totaling $627,000.00 ". . . involved loan agreements and/or mortgages which contained a provision or provisions requiring the borrower to purchase and erect on the land described therein house packages manufactured and sold by the Homes Division of United States Steel Corporation so long as the loan or loans or any portion thereof remained outstanding . . ." (JA 742-743). The defendant's own admission therefore was that *all* of its loans were conditioned upon the tie-in provisions complained of by Fortner Enterprises in this suit except a few small ones.

The defendants further admitted:

> "That the estimated percentages of total shipments of house packages by the Homes Division which were made to dealers receiving financial assistance from the Credit Corporation for the years 1960, 1961 and 1962, are as follows; 1960, sixty-eight percent; 1961 seventy percent; 1962, seventy-five percent." [JA 742; 780]

Thus, in 1960 and 1961, 68% to 70% of all sales were accounted for by loans involving the tie-in.

Land financing loans outstanding alone amounted to $5,372,000 at the end of 1960 (JA 1353), while house package sales amounted to $6,747,353 (JA 1199). At the end of 1961 land financing loans outstanding were $5,918,000 (JA 1353), while house package sales were only $5,051,992 (JA 1199).

A more significant fact is that the original amounts of the loans dated prior to the end of 1961 listed in the attachment to the Underwriting Agreement total $7,738,000 (JA 1273-1274) well in excess of the total land financing loans outstanding at the end of 1961 of $5,918,000. As previously indicated, Mr. Lang testified that all the loans on the Underwriting Agreement were land financing loans of the special category.

Fortner Enterprises was one of the companies which was obtained as a dealer through the special financing program. As United States Steel and the Credit Corporation point out at pages 6 and 7 of their Brief, the land loans were equal to 100% of the cost of the land acquisition and development and the loans were at 6% interest with a service fee on discount of one-half of 1%.

One of the key exhibits introduced in evidence was Plaintiff's Exhibit 240 obtained from United States Steel (JA 1279-1299). This is a copy of a presentation given at a seminar for Homes Division personnel on March 27, 1961, by a Homes Division employee named Neil Day, Manager of Field Sales (JA 440-445), as identified by Stanley Mack, Manager of the Sales Division of Homes Division during 1959 through 1962 (JA 439). Mr. Mack read certain portions of that exhibit, which was also a part of the Homes Division Sales Manual, during the course of his testimony (JA 445-449).

Plaintiff's Exhibit 240 first points out that any land acquisition and development loan is a higher risk loan (JA 1287), and the regular Credit Corporation loan

of that nature was 60% of the cost of land and development (JA 1288). The exhibit goes on to point out that Credit Corporation's land acquisition and development loans were based on 6% interest and one-half point fee which was very attractive compared to other manufacturers who charged a 10% fee or more in addition to simple interest (JA 1291). This exhibit points out that the special financing program was in effect and was negotiated on a dealer by dealer basis with that program by that time having been broadened to be available for any program involving sales of houses in excess of 25 units per year (JA 1294-1295). Finallly, that document makes it clear that the only purpose in making such loans was making sales of house packages (JA 1296).

In addition to Mr. Fortner, a number of witnesses testified concerning the unavailability of financing at the terms offered Fortner Enterprises, i.e., 100% land acquisition and development loans plus construction loans at 6% interest and one-half of 1% fee or discount, from other sources (JA 221-227, 355-357, 868-869, 818-824, 1003-1004).

The undisputed testimony was that the U. S. Steel package was priced $455.43 more than the comparable components at the same point in a conventional home (JA 637), and $443.26 more than the Empire pre-fabricated package in a comparable condition (JA 640).

Suffice it to say that after Fortner Enterprises entered into the building program and began making sales of the U. S. Steel packages it encountered prob-

lems of defective materials and design in the packages and delays which resulted in the subdivision obtaining a bad reputation and lack of sales with the further result of loss of income and profits to the plaintiff. All of this evidence is in the record and constituted the evidence of causation which the jury considered.

After all other solutions were tried to no avail, plaintiff sought to be relieved of the tie-in requirement at a meeting held between representatives of plaintiff, the Credit Corporation and United States Steel Corporation on June 5, 1962, and this request for relief was adamantly refused by the Credit Corporation (JA 260-263, 1261-1262). Although plaintiff was current in its accounts with the defendants at that time (JA 1300-1301), the Credit Corporation had an audit of plaintiff made and decided to demand payment of all obligations and institute legal action to collect (JA 1248-1250), and as a result such demand for payment was made on July 12, 1962 (JA 75-76), and one week later this antitrust action was instituted seeking to enjoin their foreclosure action and for damages (JA 38-76).

Actually, Respondent seriously considered filing a Petition for Writ of Certiorari in this case since the Sixth Circuit held that there were certain issues to try below. However, after careful review of the Sixth Circuit Opinion, we became reconciled to the fact that there were not significant issues to present to the Court under the principles set forth in Rule 19 of the Rules of the Supreme Court.

Basically, the Sixth Circuit held that there were fact questions for a jury on the "economic power" issue. How can a Circuit Court's conclusion that fact issues existed trigger the exercise of the Supreme Court's jurisdiction?

REASONS FOR DENIAL OF THE WRIT

Respondent will respond to Petitioners' arguments for the granting of the Writ in the order in which those arguments are made.

I.

A. The Decision Below Does Not Conflict With This Court's Mandate in the Case as to the Requisite Proof of "Sufficient Economic Power" Where Financing of a Particular Type Is the Tying Element in an Allegedly Per Se Violation.

We find ourselves defending the Sixth Circuit's opinion in this case when we actually do not agree with it. It was and is our strong feeling that the District Court's directed verdict finding the alleged tie-in illegal per se on all elements was correct.

The majority opinion of the Supreme Court in *Fortner Enterprises* v. *U. S. Steel Corp.*, 394 U. S. 495, 22 L. Ed. 2d 495, 89 S. Ct. 1252, discussed extensively the evidence in the record before the Court at that time pertaining to the market power issue and held:

> "Under these circumstances the pleadings and affidavits sufficiently disclose the possibility of market power over borrowers in the credit market to entitle petitioner to go to trial on this issue.

> "It may also be, of course, that these allegations will not be sustained when the case goes to trial. It may turn out that the arrangement involved here serves legitimate business purposes and that U. S. Steel's subsidiary does not have a competitive advantage in the credit market. But on the record before us it would be impossible to reach such conclusions as a matter of law, and it is not our function to speculate as to the ultimate findings of fact. *We therefore conclude that the showing made by petitioner was sufficient on the market power issue.*"

Respondent submits that Justice Black thus held that Respondent had made a prima facie case on this issue. What is a prima facie case? It is simply a case where a plaintiff had produced enough evidence to at least create a question for a jury, Volume 32A, Corpus Juris Secundum, § 1016, pp. 626-627.

If the plaintiff's case is not rebutted, normally the plaintiff would be entitled to a directed verdict on that issue. *G. H. Miller & Co.* v. *United States*, 260 F. 2d 286 (7th Circuit), Cert. denied, 359 U. S. 907, 3 L. Ed. 2d 572, 79 S. Ct. 582.

Justice Black early in the majority opinion held:

> "We need not consider, however, whether petitioner is entitled to a trial on this more general theory, for it is clear that petitioner raised questions of fact, which, if proved at trial, would bring this tying arrangement within the scope of the per se doctrine." (394 U. S. 500-501)

He had already held that the case basically involved a tie-in. Following the statement quoted above, the

majority opinion discussed the evidence relied upon by Respondent and concluded that Respondent's showing as to market power was sufficient.

Respondent at the trial adduced more evidence on the market power issue than appeared in the record before this Court previously. Much of that evidence is outlined in "The Facts" section of the Statement of the Case portion of this Brief. Petitioners concede that every inference most favorable to Respondent must be drawn in considering their argument that they were entitled to a directed verdict.

The Sixth Circuit obviously had the opinion that the main issue before it was whether or not Respondent had been entitled to a directed verdict at the trial level. This was certainly the principal question argued during the oral arguments before that Court. The Court held ". . . we find that while the plaintiff made out a prima facie case of Sherman Act violations the evidence and permissible inferences therefrom are in such conflict that neither party was entitled to a directed verdict" (App. A, p. A4).

The Sixth Circuit in agreeing with Petitioners that there were fact issues discussed much of the evidence relied upon by Petitioners. Judge Miller specifically pointed out that he was not attempting to discuss all of the evidence relied upon by Respondent (App. A, footnote 4, p. A19). Judge Miller analyzed the evidence of Petitioners and Respondent and held that part of that evidence involved fact issues or inferences for a jury.

One example of the nature of the evidence will illustrate Petitioners' attempt to take the Sixth Circuit's Opinion out of context. On page 11 of the Petition, Petitioners cite a statement in Judge Miller's opinion to the effect that the record is "barren of any evidence that other lending institutions in the Louisville area were subject to the same prohibitions . . ." as were national banks and federally insured savings and loan associations (App. A, p. A-13). Judge Miller held that this was a factor for a jury to consider. What the evidence did show was the type of loan in issue and being discussed by Judge Miller was not in fact available from lending institutions of any type (JA 819-824). Further, the evidence was that business risks were too great on such loans during the period in question (JA 824, 825). Justice Black pointed out that the possibility of declining market values might have made local institutions unwilling to make 100% land development loans whereas the Credit Corporation might have had a competitive advantage due to the nationwide character of its operations. The evidence established that the Credit Corporation had the competitive advantage as a result of the use of U. S. Steel's borrowing power (App. A, p. A15), and because U. S. Steel guaranteed that it would reimburse the Credit Corporation for any losses resulting from the loans made to Respondent and others in the special category (JA 1268-1272).

Another example of Petitioners taking a portion of the Sixth Circuit's Opinion out of context is found in the first literary paragraph at page 12 of the Petition

where reference is made to the level of the Credit Corporation's profits. Immediately preceding that reference we find in the Sixth Circuit's Opinion a description of some of Respondent's evidence concerning the Credit Corporation's economic advantages and a conclusion that the evidence pertaining to economic advantage was conflicting. The Credit Corporation's evidence as to its level of profitability was cited as part of the conflicting evidence. We certainly contend that the low profitability level of the Credit Corporation is proof that it had elected to forego higher profits, i.e. raise price, by imposing the tie. We certainly didn't have to prove that the Credit Corporation was successful in both exacting monopoly profits and tie-in agreements from its customers. The level of profits is, therefore, not conclusive of anything, and at best is subject to varying interpretations.

Petitioners argue that if the Credit Corporation had economic power over money, U. S. Steel would have used it in other areas of its business. We don't know how U. S. Steel used its vast economic power in other market areas. We're sure that any attempted discovery in those areas would have been vehemently opposed as irrelevant. For all we know, U. S. Steel has other subsidiaries doing the same thing in other areas of products. We do know that U. S. Steel has signed a Consent Order prohibiting it from entering into reciprocity arrangements with its suppliers. *United States* v. *United States Steel Corp.*, 1969 C.C.H. Trade Cases, § 72, 826, p. 87,025. We do know that U. S. Steel has a long history of antitrust charges.

Even if U. S. Steel has not engaged in such practices in conjunction with its other lines of products, if this Court's decision in *Fortner Enterprises* v. *U. S. Steel Corp., supra*, is withdrawn, we are confident that it will exercise its vast power in the future in just such retrictive efforts.

Petitioners certainly were not entitled to a directed verdict as to the per se violation of Section 1 of the Sherman Act. The Trial Court directed a verdict for Respondent which we thought the Sixth Circuit should affirm. Instead the Sixth Circuit found fact issues on economic power. Respondent submits that a finding of factual issues is not a basis for granting a Petition for Writ of Certiorari.

B. The Sixth Circuit Decision Does Not Conflict With This Court's Mandate in This Case and Its Other Decisions as to the Requisite Proof Required for a Non Per Se Violation of Section 1 or Section 2 of the Sherman Act.

The Trial Court at the close of all of the proof directed a verdict for Plaintiff-Respondent against Petitioners on the alternative allegations of a general contract, combination and conspiracy to restrain commerce under Section 1 of the Sherman Act and a conspiracy to monopolize under Section 2 of the Act. The Sixth Circuit likewise reversed this decision of the Trial Court holding that these issues concerning liability should also be submitted to a jury. This was, of course, part of the relief sought by Petitioners in the Sixth Circuit.

Justice Black at page 498 of the majority opinion had originally pointed out that even though the standards of *Northern Pacific Railway Co.* v. *U. S.*, 356 U. S. 1, 2 L. Ed. 2d 545, 78 St. Ct. 514, could not be met, that a plaintiff could still prevail under general Sherman Act standards on the basis of a more detailed examination of the purposes and effects of the practices involved. The Trial Court below upon remand and after hearing all of the evidence, felt, as did Respondent, that the evidence concerning the purpose and effect of the actions of Petitioners violated Section 1 and Section 2 of the Sherman Act as a matter of law and so held. He did not have to instruct the jury on this point since he had already held there to be a per se violation of Section 1 of the Sherman Act and directed the jury accordingly (JA 198).

Contrary to the Petitioners, the Sixth Circuit Opinion is certainly consistent with Justice Black's Opinion.

There is no question but that the rule of reason must be applied to a Sherman Act Section 1 violation which does not reach the per se level. There certainly was sufficient evidence in the record to go to the jury as to the purposes and effects of the Petitioners' conduct. The same evidence which established the purpose and effect of the actions of Petitioners also established the requisite "intent" required for a conspiracy to monopolize under Section 2 of the Sherman Act.

At the time the Credit Corporation was established in 1954, a recommendation was made that a financing corporation be established to provide construction

money and to originate mortgages for resale to investors (JA 1088, 1089). It was specifically understood at that time that the Credit Corporation ". . . will not be used as a means to force sales to dealer-builders" (Paragraph (b) PX 1-M; JA 1090).

During the following years, the Homes Division of United States Steel Corporation did not have the quality of product or price or personnel to compete on the merits in the prefabricated house package market (JA 801, 802). The U. S. Steel package was priced $455.00 more than comparable components at the same point in a conventional home (JA 637) and $443.00 more than the Empire prefabricated package in a comparable condition (JA 640). The trial record was replete with evidence concerning defective components and defective design of the U. S. Steel package and was not really disputed below.

Since U. S. Steel was not obtaining the share of the prefabricated house market it desired, a change of policy was put into effect in 1958. The Finance Committee of U. S. Steel authorized and directed the Credit Corporation to make loans to dealers without conformity with conventional or conservative patterns to enable the Homes Division to attain a minimum distribution of 1,800 units in 1959 (JA 1095, 1096), and this "special" financing program was continued through at least 1961 (JA 1098). The credit corporation had made at least 43 loans of this type by March, 1962, including the loan to Fortner Enterprises (JA 1268-1274), and all of said loans as well as all other Credit Corporation loans with minimal exceptions in-

volve the contractual tie-in which has been discussed so much in this suit (JA 742, 743).

It was undisputed in the record that the purpose and intent of the Petitioners, separate corporate entities, was to increase the share of the market of U. S. Steel in prefabricated houses by use of the particular type loan authorized by the Finance Committee of U. S. Steel.

To effectuate that purpose and intent U. S. Steel, in March, 1962, guaranteed any losses which the Credit Corporation might have as a result of the "special" program loans (JA 1268-1272).

There was ample evidence in the record of the effect of this program. The Credit Corporation's loan commitments for 1960 were in excess of $22,000,000, in excess of $19,000,000 for 1961, and also in excess of $19,000,000 in 1962 (JA 742, 743). For 1960 and 1961, 68% to 70% of all house package sales were accounted for by loans involving the tie-in (JA 742; 780). Over $4,500,000 of sales in 1960 and $3,500,000 of sales in 1961 were foreclosed to the competitors of U. S. Steel, not because of the merits of the U. S. Steel house package as to quality or price, but as a direct result of the special financing program and the restraints appearing in the loan documents of the Credit Corporation.

Petitioners use this portion of their Petition to argue their position concerning the construction to be given the evidence. The fact that Petitioners were unsuccessful in their scheme during the period in question is not relevant. The fact of foreclosure of com-

petitors was definitely established in the record. It was admitted by Petitioners that the Credit Corporation had by contract eliminated numerous projects in the various states in which the Homes Division made sales from competitors. The Credit Corporation under its loan agreements and mortgages could take by foreclosure, or otherwise, a borrower's property if he violated the terms of the agreement. This was the very threat that was being made to Respondent at the time this suit was originally filed. The undisputed evidence actually showed that Respondent sought to be relieved from the contractual obligation to build Homes Division houses at Respondent's project and was forcefully refused (JA 260-263), and the Credit Corporation immediately thereafter took the initial steps to begin foreclosure proceedings (JA 1258-1262), even though Respondent was current with the Credit Corporation on its account at that time (JA 1300-1301). There was clearly evidence of affirmative action taken on Credit Corporation's part to effectuate the purpose and intent of Petitioners as to this Respondent.

Respondents submit that there was ample evidence in the record at least to go to the jury on the general Section 1 and Section 2 violation. *United States* v. *Yellow Cab Co.*, 332 U. S. 218, 97 L. Ed. 2010, 67 S. Ct. 1560, at 332 U. S. page 225, holds:

> "But the amount of interstate trade thus affected by the conspiracy is immaterial in determining whether a violation of the Sherman Act has been charged in the complaint. Section 1 of the Act outlaws unreasonable restraints on inter-

> state commerce, regardless of the amount of commerce affected . . . and Section 2 of the Act makes it unlawful to conspire to monopolize 'any part' of interstate commerce; without specifying how large a part must be affected. Hence it is enough if some appreciable part of interstate commerce is the subject of a monopoly . . .
>
> "Likewise irrelevant is the importance of the interstate commerce affected in relation to the entire amount of that type of commerce in the United States."

Contrary to Petitioners' argument, in a charge of conspiracy to monopolize neither dangerous probability of achieving monopoly nor the relevant market are required to be proven. One of the very cases cited by Petitioners, *United States* v. *Consolidated Laundries Corporation*, 291 F. 2d 563 (2nd. Cir., 1961), dealt with these specific points and held that neither a dangerous probability of success or the relevant market were required in a conspiracy to monopolize case. *American Tobacco Company* v. *United States*, 328 U. S. 781, 66 S. Ct. 1125, 90 L. Ed. 1575, holds that:

> "Petitioners, for example, might have been convicted of a conspiracy to monopolize without ever having acquired the power to carry out the object of the conspiracy."

The Sixth Circuit's findings that there were fact issues concerning the general allegations of violation of Sections 1 and 2 of the Sherman Act were certainly not inconsistent with the Supreme Court's Opinion in this case. While Respondent did not agree with the

Sixth Circuit's findings, Respondent does not see how those findings as to these issues raise sufficient grounds for the invocation of the Supreme Court's jurisdiction on the Petition for Writ of Certiorari in this case.

II.

Although the Decision Below May Conflict With the Decision of Another Court of Appeals, This Is Not a Sufficient Ground to Grant the Petition in This Case Since the Conflict Does Not Adversely Affect Petitioners in This Case.

The principal ground on which Respondent had originally contemplated filing a Petition for Writ of Certiorari itself in this case was the conflict between the Sixth Circuit and the Fourth Circuit Court of Appeals as decided in *Advance Business Systems & Supply Company* v. *SCM Corporation*, 415 F. 2d 455 (4th Cir. 1969) Cert. denied, 397 U. S. 920 (1970). It was Respondent which was adversely affected by the Sixth Circuit's decision since the Fourth Circuit had found that acceptance by a substantial number of customers of a tie-in arrangement in and of itself established the requisite economic power over the tying product. From the evidence in this record, as previously illustrated, all of the Credit Corporation's customers accepted the tie-in and this accounted for 68% to 70% of the Homes Division's sales of house packages during the pertinent period. Respondent relied heavily upon the Fourth Circuit's decision in the District Court and in the Sixth Circuit since the Supreme Court had denied certiorari in the *Advance Business Systems' case, supra.*

If this Court holds that the Fourth Circuit's interpretation of the Supreme Court Opinion in *Fortner Enterprises* v. *U. S. Steel,* 394 U. S. 495, 22 L. Ed. 2d 495, 89 S. Ct. 1252, was correct, then the Sixth Circuit should have left the directed verdict which the Trial Court gave Respondent alone. Petitioners would certainly not be entitled to any affirmative relief from the Sixth Circuit Opinion as a result of such a finding.

Respondent would be delighted to have the Court accept jurisdiction and grant Petitioners' Writ based on this argument of conflict between the Circuits, if this Court would entertain the thought of sustaining the position of the Fourth Circuit. If this Court would consider sustaining the position of the Sixth Circuit, there simply is no reason to grant the Petition in this case since Petitioners would not be entitled to any affirmative relief as a result of such a ruling. Respondent does not visualize this as the type of basis which the Supreme Court uses in granting a Petition for Writ of Certiorari.

III.

The Decision Below Does Not Raise Significant and Recurring Problems of Great Moment to the General Economy.

Outside of a number of articles written by economists and law professors, Respondent has not observed any startling effects on the economy of this country as a result of this Court's decision in this case. Petitioners are really attacking this Court's original decision in this case in the argument made in this section of their

Petition. This Court's original Opinion, as written, is sound and consistent with the tie-in cases decided by this Court.

Since we were dealing with financing as the tying element when this case originally came before this Court, and when the suit was filed, we were of necessity dealing with Section 1 of the Sherman Act. We felt compelled to rely upon the applicable Sherman Act cases such as *International Salt Co.* v. *United States,* 332 U. S. 392, 92 L. Ed. 20, 68 S. Ct. 12, and *Northern Pacific Railway Co.* v. *United States,* 356 U. S. 1, 2 L. Ed. 2d 545, 78 S. Ct. 514. Respondent would have been delighted if Justice Black and the majority of the Court had adopted the reasoning of Milton Handler set forth in two of the Petitioners' citations, 55 Cornell L. Rev. 161 (1970) and Recent Trends in Supreme Court Antitrust Divisions: Commentary—Past, Present and Future, 38 Antitrust L. J. 602, 616-618 (1969). Professor Handler points up the inconsistencies between the law applicable under the Clayton Act and the Sherman Act concerning tie-ins. He aptly points out there really should be no distinction between a tie-in attack under Section 1 of the Sherman Act or a tie-in attack under the Clayton Act or the Federal Trade Commission Act. There is much logic in having a uniform standard. Respondent feels that the standard should be that appearing in the Clayton Act cases which basically would require only a showing that a not insubstantial amount of commerce in the tied product was affected as a result of the tie. This is the only logical clarification of the tie-in rules which Respondent

could envision this Court making. Such a ruling would certainly eliminate any factual issues for a jury in this present case.

Respondent knows of no plethora of suits which have resulted since this Court's decision in this case. Petitioners cite no pending litigation involving these questions.

The Petition for Writ of Certiorari before this Court is not the proper vehicle and this case is not the proper vehicle for the Court to decide the applicability of the antitrust laws to the general or standard arrangement whereby a seller sells his product on credit. As the majority opinion points out, this is *not* that type of case. The Sixth Circuit Opinion did not make it that type of case and Petitioners do not so argue.

As we have previously indicated, Petitioners are actually in this portion of their Petition seeking to get this Court to set aside its original Opinion in this case under the guise of a clarification of the Sixth Circuit Opinion. Respondent does not believe that this Court desires to withdraw the original Opinion in this case, although we are convinced that this Court will eventually establish the same rules for tie-in cases regardless of the statute under which they are attacked. Again, Petitioners would not be entitled to any affirmative relief even if the Court did decide to make the ground rules for tie-in cases more explicit and there is, therefore, no basis for the granting of the Petition for Writ of Certiorari.

CONCLUSION

Petitioners argued in the Sixth Circuit there were fact issues for a jury to decide and the Sixth Circuit sustained their position. The Sixth Circuit did not sustain their position that they were entitled to a directed verdict. This Court, in its original Opinion, held that Respondent was entitled to go to the jury at least on the question of a per se violation of Section 1 of the Sherman Act. That Opinion thus held that Respondent had established a prima facie case and thereafter the District Court so held, as has the Sixth Circuit in its recent Opinion. Now, as a basis for its Petition for Writ of Certiorari, Petitioners argue that issues of law will be submitted to the jury. Nothing could be more incorrect. The Sixth Circuit has held that the question of whether or not the Credit Corporation had sufficient economic power to impose the tying arrangement on Respondent is one for the jury. The Court has held that the jury will be entitled to consider all of the evidence in the record pertaining to this issue.

Respondent is at a loss to know what Petitioners really do want in this case other than an absolute dismissal. They are certainly not entitled to that relief.

Respondent is actually the only one with standing to complain about the action of the Sixth Circuit in this case. After a conscientious review of the Sixth Circuit Opinion, Respondent did not see how it could ask this Court to review the Sixth Circuit Opinion, since all the Sixth Circuit really held was that there were issues of fact for a jury to decide. Petitioners

have not presented an adequate basis for this Court to grant the Petition for Writ of Certiorari and the Petition should be denied.

Respectfully submitted,

KENNETH L. ANDERSON
WOODWARD, HOBSON & FULTON
1805 Kentucky Home Life Building
Louisville, Kentucky 40202

A. SCOTT HAMILTON, JR.
HAMILTON, HOPSON, LONG & ROGERS
310 West Liberty Street
Louisville, Kentucky 40202

Counsel for Respondent

APPENDIX A

Opinion of the United States Court of Appeals for the Sixth Circuit

No. 71-1194

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FORTNER ENTERPRISES, INC.,
Plaintiff-Appellee,

v.

UNITED STATES STEEL CORPORATION and
UNITED STATES STEEL HOMES CREDIT CORPORATION,
Defendants-Appellants.

APPEAL from the United States District Court for the Western District of Kentucky, Louisville Division

---

Decided and Filed December 16, 1971.

Before: MILLER and KENT, Circuit Judges, and CECIL, Senior Circuit Judge.

MILLER, Circuit Judge. This is the second appeal in this private antitrust action.[1] At the first trial the district court granted summary judgment for the defendants, holding that petitioner had failed to raise any question of fact as to a possible violation of the antitrust laws. *Fortner Enter-*

---

1. The action was instituted by Fortner Enterprises, Inc. against U. S. Steel Corporation and its wholly owned subsidiary, the U. S. Steel Homes Credit Corporation, pursuant to Secs. 1 and 2 of the Sherman Act, 15 U.S.C., Secs. 1 and 2, seeking treble damages and injunctive relief against further violations.

prises, Inc. v. *U. S. Steel Corp., et al.*, 293 F.Supp. 762 (1966). The judgment was affirmed by this Court without opinion but the Supreme Court in a 5-4 decision, holding on the facts set forth in the record as it was constituted at that time, that summary disposition was improper and the action should go to trial, reversed the judgment of affirmance of this Court and remanded the action with directions that it proceed to trial. *Fortner Enterprises, Inc.* v. *United States Steel Corp.*, 394 U. S. 495 (1969). The majority and minority opinions in this case have stimulated much general interest and wide scholarly examination.[2] Upon remand, the district judge, after a trial before a jury which occupied approximately one month, sustained the plaintiff's motion for a directed verdict and overruled the defendants' similar motion. He submitted to the jury only the question of damages which should be awarded in favor of the plaintiff. The jury returned a verdict in the amount of $93,200.00

---

2. We are aware of the controversy which surrounds the tying arrangement cases generally, a controversy involving differences over both economic policy (See, e.g. Markowitz, *Tie-ins, Reciprocity, and the Leverage Theory*, 76 Yale L.J. 1397 (1967); Bowman, *Tying Arrangements and the Leverage Problem*, 67 Yale L.J. 19 (1957); and the proper application of legal doctrine (See e.g. Kauper, *The Warren Court and the Anti-trust Laws: Of Economics, Populism and Cynicism*, 67 Michigan L.Rev. 325 (1968); Pearson, *Tying Arrangements and Antitrust Policy*, 60 NW.U.L.Rev. 626 (1965). We have studied with interest and special care the scholarly comments which the Supreme Court's opinions in this case have generated, finding especially useful a note: *The Logic of Foreclosure: Tie-in Doctrine after Fortner* v. *U. S. Steel*, 79 Yale L.J. 86 (1969). See also, Dam, *Fortner Enterprises* v. *United States Steel: "Neither A Borrower, Nor A Lender Be,"* 1969 Supreme Court Review 1; *Recent Trends in Supreme Court Antitrust Decisions: Commentary—Past, Present and Future*, 38 Antitrust Law Journal 602 (1969); Note, *Credit As a Tying Product*, 69 Col.L.Rev. 1435 (1969); and The Supreme Court, 1968 Term, 83 Harv.L.Rev. 235.

which was trebled by the court. Motions for judgment n.o.v. and, alternatively, for a new trial were denied and judgment for plaintiff was entered on November 23, 1970. The defendants raise no question on the present appeal as to damages, having elected to limit the appeal to the issue of liability under the Sherman Act. Their insistence is that the court erred in directing a verdict in favor of the plaintiff and that, on the contrary, the court should have sustained the defendant's motion for a directed verdict. It is argued, in the alternative, that at least the case was one for the jury and that the action should be remanded for a new trial before a jury on the question of liability only, the damage issue already having been decided by a jury.

In its original and amended complaints the plaintiff charged that the defendants had engaged in a contract, combination, and conspiracy to restrain trade and to monopolize trade in the sale of prefabricated houses. Alleging that there was a continuing agreement between the defendants to force the plaintiff and other corporations and individuals, as a condition to availing themselves of the services of the Credit Corporation, to purchase at artificially high prices only U. S. Steel Homes, plaintiff specifically claimed that in order to obtain loans totaling over two million dollars from the Credit Corporation for the purchase and development of certain land in the Louisville, Kentucky, area, it had been required to agree, as a condition of the loans, to erect a prefabricated house manufactured by U. S. Steel Corporation on each of the lots purchased with the loan proceeds. It was further claimed

that the prefabricated materials were then supplied by U. S. Steel at unreasonably high prices and proved to be defective and unusable, thus requiring the expenditure of additional sums and delaying the completion date for the development.

To determine whether a directed verdict is appropriate the governing principle is that a verdict may properly be directed only when, without weighing the credibility of the witnesses, there can be but one reasonable conclusion as to the verdict. Where there is conflicting evidence or insufficient evidence to make only a "one way" verdict possible, a directed verdict is improper. *Brady* v. *Southern Railway Co.*, 320 U. S. 476, 479-80 (1943); 5A *Moore's Federal Practice* ¶50.02[1] pp. 2321, 2. An appellate court too is bound to view the evidence in the light most favorable to the party against whom the motion for a directed verdict is made and give him the advantage of every fair and reasonable inference that the evidence may justify. *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962); 5A *Moore's Federal Practice*, ¶50.02[1] pp. 2326, 7.

Examining the record on the basis of these standards and in the light of the Supreme Court's opinion in this case, we find that while the plaintiff made out a prima facie case of Sherman Act violations the evidence and permissible inferences therefrom are in such conflict that neither party was entitled to a directed verdict. Instead the question of liability should have been submitted to the jury as well as the question of damages. Both the plaintiff and defendants to support their respective positions rely upon the Supreme Court's opinion in this case on the first appeal. In doing so they quote selective portions from the opinion which

tend to indicate some support for the particular views which they espouse. It becomes necessary, therefore, in the resolution of this appeal to examine the Supreme Court's opinion to discover its real thrust and impact in the context of the facts of the present litigation as they were developed at the second trial.

At the outset it is well to bear in mind that on the first appeal the Supreme Court was not considering the alleged antitrust violations in the light of a full trial on the merits. Rather the specific question before it was a procedural one, i.e., whether it was appropriate for the district court on the basis of the facts as they had been developed from affidavits and pretrial procedures to dispose of the case by summary judgment. That the Court did not intend to indicate any view as to what the trier of the facts should find from the evidence was expressly pointed out when the Court said that it might turn out that the plaintiff's allegations will not be sustained when the case goes to trial. "It may turn out," as the Court further stated, "that the arrangement involved here serves legitimate business purposes and that U. S. Steel's subsidiary does not have a competitive advantage in the credit market. But on the record before us it would be impossible to reach such a conclusion as a matter of law, and it is not our function to speculate as to the ultimate findings of fact." It is also of significance that the Court indicated its reluctance to dispose of antitrust cases by summary procedure. Addressing itself specifically to the use of summary judgment procedure in antitrust cases, the Court stated: "Since summary judgment

in antitrust cases is disfavored, *Poller*,[3] *supra*, the claims of uniqueness in this case should be read in the light most favorable to petitioner." (Plaintiff).

It was developed at trial that the Homes Division of U. S. Steel manufactures component parts for prefabricated houses, selling what it terms home packages in various states. The sales are made through dealer-builders such as the plaintiff. U. S. Steel's subsidiary, the Credit Corporation, was founded in 1954 as a wholly owned subsidiary for the purpose of providing financial assistance to the Homes Division's dealer-builders who were unable to obtain suitable financial assistance from more conventional sources. In effect the services of the Credit Corporation were a "tool" to assist the Homes Division in the sale of its houses. Beginning in 1958 the policies of the Credit

---

3. In *Poller* v. *Columbia Broadcasting Co., Inc., et al.*, 368 U.S. 464, 473 (1962), the Court in stating that summary procedures should be used sparingly in complex antitrust litigation used language which we think is of significance in determining the appropriateness of directing a verdict in this case rather than submitting the issues to a jury for evaluation:

> We look at the record on summary judgment in the light most favorable to Poller, the party opposing the motion, and conclude here that it should not have been granted. We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of "even handed justice."

Although summary judgment and a directed verdict are procedurally distinguishable both substitute the court for the jury as the fact-finder. Some of the considerations dictating a reluctance to resort to summary judgment in complex antitrust cases are equally applicable to the direction of a verdict.

Corporation were changed, when a program of "special assistance" was initiated whereby credit was made available in high risk situations on particularly reasonable terms to Homes Division dealer-builders. As reflected by the minutes of the U. S. Steel finance committee, the purpose of the policy was to enable Homes Division "to attain a minimum of 1800 units in 1959." To reach this goal and such additional distribution as may be feasible the Credit Corporation was directed to make loans to dealers without conformity to conventional or conservative patterns "but within the bounds of prudent business judgment." It was contemplated that Homes Division would underwrite such loans, guaranteeing losses to a defined extent.

In 1959 it came to the attention of the Homes Division that certain land in an existing subdivision in the Louisville, Kentucky, area might be available for development. The land was owned by a corporation in which A. B. Fortner, a successful and well-known real estate developer, held a 50% interest. Later in that year U. S. Steel initiated discussions with Fortner with the idea that the property might be an attractive vehicle for it to enter the Louisville prefabricated housing market. Following negotiations an agreement was reached whereby Fortner's wholly-owned corporation, Fortner Enterprises, Inc., would become a franchised dealer-builder of the Homes Division product. It was part of the agreement that the Credit Corporation would extend credit to the plaintiff corporation for the development conditioned upon the construction on each of the 187 lots purchased by the plaintiff [of] a prefabricated house from the Homes Division of U. S. Steel. The initial

loan was $2,055,300.00. Interest at the rate of six percent per annum, plus a service charge of one-half of 1%, was to be charged. Of the total commitment, $373,200.00 was to cover the cost of acquisition and development of the lots; the remainder was to cover the purchase and construction of the houses. The land loan equaled 100% of the cost of the land acquisition and development.

There was evidence that the plaintiff experienced difficulties with the U. S. Steel products, including the omission of parts and the delivery of defective parts which necessitated additional work. Substantial complaints were made with respect to the Homes Division products from home owners who had purchased the homes from Fortner. Yet during this period Fortner requested additional financing for the purchase and development of land on which Homes Division houses were to be placed. Thus, on August 2, 1961, Fortner executed a land and mortgage note in the amount of $59,000.00 and a construction note in the amount of $403,400.00. Having continued to experience difficulties with the prefabricated houses and having run out of cash, Fortner requested that he be relieved of the requirement that the financing be used for the construction of Homes Division houses. This request was refused but Fortner was advised that he was free to refinance the Credit Corporation's loan and proceed to obtain houses from other sources. Thereafter, in July 1962 he instituted the present action.

In *Northern Pacific Railway Co., et al.* v. *United States*, 356 U.S. 1 (1958), the Supreme Court defined the tying arrangement device, identified its evils and stated the prerequisites for per se illegality in the following fashion:

Appendix A

For our purposes a tying arrangement may be defined as an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier. Where such conditions are successfully exacted competition on the merits with respect to the tied product is inevitably curbed. Indeed "tying agreements serve hardly any purpose beyond the suppression of competition." *Standard Oil Co. of California* v. *United States*, 337 U. S. 293, 305-306. They deny competitors free access to the market for the tied product, not because the party imposing the tying requirements has a better product or a lower price but because of his power or leverage in another market. At the same time buyers are forced to forego their free choice between competing products. For these reasons "tying agreements fare harshly under the laws forbidding restraints of trade." *Times-Picayune Publishing Co.* v. *United States*, 345 U. S. 594.

They are unreasonable in and for themselves whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product and a "not insubstantial" amount of interstate commerce is affected. *International Salt Co.* v. *United States*, 332 U. S. 392. Cf. *United States* v. *Paramount Pictures*, 334 U. S. 131, 156-159; *United States* v. *Griffith*, 334 U. S. 100. Of course where the seller has no control or dominance over the tying product so that it does not represent an effectual weapon to pressure buyers into taking the tied item any restraint of trade attributable to such tying arrangements would obviously be insignificant at most. As a simple example, if one of a dozen food stores in a community were to refuse to sell

> flour unless the buyer also took sugar it would hardly tend to restrain competition in sugar if its competitors were ready and able to sell flour by itself. 356 U. S. at 5, 6 and 7.

Once it is established that a tying arrangement exists, it must be determined whether a "not insubstantial" amount of commerce affected by the tie and whether the tier has "sufficient economic power" in the market for the tying product.

We need not deal at length with whether a "tying arrangement" exists in this case, nor whether the amount of commerce affected is "not insubstantial." The Court rejected Mr. Justice Fortas' argument that this was not a "tying arrangement":

> We agree with the District Court that the conduct challenged here primarily involves a tying arrangement of the traditional sort. 394 U. S. at 498.

On the matter of whether the volume of commerce allegedly foreclosed was "not insubstantial" the Court stated:

> The complaint and affidavits filed leave no room for doubt that the volume of commerce allegedly foreclosed was substantial. It may be true, as respondents claim, that petitioner's annual purchases of houses from U. S. Steel under the tying arrangement never exceeded $190,000, while more than $500,000 in annual sales was involved in the tying arrangement held illegal in *International Salt, but we cannot agree with respondents that a sum of almost $200,000 is paltry or "insubstantial."* 394 U.S. 501, 2. (Emphasis added).

The issues raised regarding the second standard, that of "sufficient economic power," is far more troublesome, but we think that so far as the present record reflects, the issue should have gone to the jury. Of this issue, Mr. Justice Black stated that "* * * the pleadings and affidavits sufficiently disclose the *possibility* of market power over borrowers in the credit market to entitle petitioner to go to trial on this issue." (Emphasis added.)

In other Supreme Court cases in which a "tying arrangement" has been found to be illegal per se under the Sherman Act, this question did not pose the same factual uncertainty as here. Sufficient economic power was shown in *International Salt Co.* v. *United States*, 332 U.S. 392 (1947), by the simple fact that the tying product was patented; in *United States* v. *Loew's, Inc.*, 371 U.S. 38 (1962), the tying product was copyrighted; and in *Northern Pacific Railway Co., et al.* v. *United States*, 356 U.S. 1 (1958), it was the physical uniqueness of the land which constituted the tying product.

Here no such talisman exists. The Court rejected Fortner's "apparent argument that market power can be inferred simply because the kind of financing terms offered by a lending company are 'unique and unusual.'" Having done so, however, the Court refused to specify precisely what proof would satisfy the standard of the per se rule. Yet the Court was not entirely silent as to the sort of proof which could be weighed in determining the existence of the necessary "economic power" in the tying product.

Under the antitrust statutes, the tying cases are fundamentally based on the notion that competitive advantage in

one market (that of the tying product), whether the result of a patent, copyright, physical uniqueness, a cost advantage or whatever else might serve as a source of leverage, should not be translated into a competitive advantage in another distinct market (that of the tied product).

The focus of our present inquiry is whether the Credit Corporation possessed leverage in the credit market (the "tie" here being the extension of credit) sufficient to induce buyers in the market for prefabricated houses (the "tied" product) to accept a less competitive product.

It is clear that such leverage need not be of sufficient magnitude to constitute monopoly power or even market dominance. As stated in the majority opinion in this case:

> The standard of "sufficient economic power" does not, as the District Court held, require that the defendant have a monopoly or even a dominant position throughout the market for the tying product. Our tie-in cases have made unmistakably clear that the economic power over the tying product can be sufficient even though the power falls short of dominance and even though the power exists only with respect to some of the buyers in the market. See, *e.g.*, *International Salt; Northern Pacific; United States* v. *Loew's Inc.*, 371 U.S. 38 (1962). 394 U.S. at 502, 3.

And in *United States* v. *Lowe's Inc.*, 371 U.S. 38 (1962), the Court stated:

> • • • Even absent a showing of market dominance, the crucial economic power may be inferred from the tying product's desirability to consumers or from uniqueness in its attributes. 371 U.S. at 45.

Appendix A

As we have pointed out, the Court expressly rejected Fortner's "apparent" argument that the uniqueness of the loan, namely the fact that one hundred per cent land financing may have been unavailable elsewhere in Louisville at the time the loan commitment was made, alone constitutes proof of "sufficient economic power." It was apparently the view of the Court that, while plaintiff need not prove dominance in the credit market on the part of the Credit Corporation, it must prove that the "unique and unusual" terms offered by the Credit Corporation reflected some unique economic advantage over its competitors. The Court pointed to two possible sources of such advantage: (1) competitors in the credit market might be legally precluded from offering credit on such terms; and (2) the Credit Corporation might enjoy some cost advantage not shared by potential competitors in the relevant credit market in Louisville. The Court did not preclude the possibility of other sources of leverage.

Turning to the evidence with respect to these two possible sources of economic power suggested by the Supreme Court, judicial notice may be taken of the fact that national banks may make loans only on improved real estate, and that federally insured savings and loan associations are limited to loans up to 70% of the real estate as developed. Yet the record appears to be barren of any evidence that other lending institutions in the Louisville area were subject to the same prohibition, such as mutual savings banks, credit unions, pension funds, finance companies, mortgage companies, building and loan associations, and insurance companies. A jury should be permitted to evaluate the

significance of the freedom of such traditional lending sources from any restriction against extending 100% financing in deciding whether competitors in the Louisville credit market were precluded from offering credit on such terms. On the same facet of the case there was testimony at trial that soon after plaintiff negotiated its financing terms with the defendants of 100% financing, traditional lending agencies in Louisville indeed began offering loans upon the same basis. Such fact, while not conclusive of the situation as it existed at the time plaintiff's loans were consummated, could be appropriately considered by a jury in reaching the ultimate conclusion whether the Credit Corporation had economic power in the credit market so as to come within the per se rule. Further, while the plaintiff offered some evidence that 100% financing was not generally available on the Louisville market at the time of its financing with the Credit Corporation, it must be conceded that the amount of the loan as a percentage of the collateral or security is only one element in determining its advantage to a borrower. Other relevant factors, as appropriately pointed out by the defendants, include the rate of interest charged, whether the lender discounts the amount loaned or charges service or other fees, and the maturity and terms of repayment. Proof alone that an institution is prohibited from granting 100% land financing would therefore seem to be insufficient to establish the fact that it is unable to offer terms embodying other elements which would make its financing equally favorable or advantageous to the borrower.

As to the second factor suggested by the majority opinion (that of a possible cost advantage) we again find that the record is open to varying interpretations, inferences and conclusions. It is true that the Credit Corporation as a wholly owned subsidiary of U. S. Steel was able to obtain funds for lending purposes at the prime rate, and that U. S. Steel necessarily stood behind repayment of any funds which the Credit Corporation was required to borrow. Also, as a subsidiary of U. S. Steel, it may be inferred that the Credit Corporation was not expected to maximize profits but to assist in the sales of the Homes Division houses. During the relevant period no dividends were paid to the parent corporation and there is no evidence that the Credit Corporation competed aggressively as a lender. These considerations could conceivably be taken by a jury as some evidence that the Credit Corporation was able to make loans at a level of risk unacceptable to most lending institutions. On the other hand, the record justified the conclusion that the Credit Corporation, while not operating at a loss, had comparatively low profits. Its total net profits in 1960 and 1961 were $52,197.00 and $59,053.00, respectively. In those same years its earnings in relation to net worth were 4.5% and 4.8%. At least two local mortgage companies in Louisville had higher earnings in relation to net worth in both of these years. There is no showing in the record that there were lenders in or out of Louisville having higher costs or lower profitability than the Credit Corporation. Of course, the Credit Corporation, as the evidence demonstrated, incurs the usual operating costs of a lending institution, including clerical and management

salaries, rent, charges for office equipment, supplies, services, taxes, etc. Moreover, it would be relevant for the jury to take into account that the Credit Corporation operates at some disadvantage in that traditional lending agencies doing business in a community on a continuing basis serve a concentrated geographic area having a larger and more diversified clientele of borrowers permitting them to achieve cost savings and efficiencies not available to a lender engaged in a business like that of the Credit Corporation. It is also possibly true that traditional lending institutions are in position to spread their risks and costs both over a larger volume of business and over different areas of the economy.

The Credit Corporation obtained its funds primarily from banks. In 1961 it had borrowed from banks approximately ten to fourteen million dollars. For the borrowing of these funds it paid the prime rate. On the funds which it borrowed from U. S. Steel it paid the prime rate plus one per cent. It may be that the jury could infer from the record that the Credit Corporation incurred higher costs in acquiring money to lend than the costs incurred by commercial banks, savings and loan associations and insurance companies. In this connection it must be remembered that we are here dealing not with advantages which a finance subsidiary may give to its parent in relation to competitors in the parent's line of business, but with the question whether the finance subsidiary has a unique advantage over financial institutions and other competitors in the lender's market.

Plaintiff also points to the fact that the Homes Division guaranteed or underwrote the land financing extended to plaintiff and certain others. It is argued that this fact demonstrates economic power over credit. This conclusion, in our view, is not necessarily true. On the contrary, it may simply be a factor which demonstrates that it was necessary for the Credit Corporation to be subsidized against any loss incident to the greater cost and risk involved. Doubtless other lending institutions in the relevant market were of sufficient strength and soundness to inspire confidence in their loan commitments.

Plaintiff's reference to the Supreme Court majority's statement in regard to the Homes Division houses being priced some $400.00 higher than comparable houses would not appear to have any conclusive effect on the question which we are now considering. It is clear from the opinion that Mr. Justice Black and those justices who joined him in the majority opinion did not reach any definitive conclusion as to the effect of this factor. On the contrary, as pointed out, they merely said that a substantial price differential "may suggest" or is not inconsistent with the "possibility of market power." The evidence on this question should be weighed by the jury and its proper probative value determined.

While the plaintiff claims a violation of Sec. 2 of the Sherman Antitrust Act, we do not deem it necessary to discuss the evidence on this question since it consists substantially of the same evidence offered in support of the alleged Sec. 1 violation. We are satisfied that the total evidence, measured in terms of the principles enunciated by the

majority opinion of the Supreme Court on the first appeal, make it inappropriate for the Court to approve a directed verdict for either party in this case on the liability issues under Secs. 1 and 2 of the Sherman Act.

In *Advances Business Systems & Supplies Co.* v. *SCM Corporation*, 415 F.2d 55 (4th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970), the Court, as the plaintiff argues, interpreted *Fortner* as holding that "* * * the 'sufficient economic power' test of per se illegality is satisfied when it appears that the seller has the power to 'impose other burdensome terms such as a tie-in with respect to any appreciable number of buyers within the market.'" Plaintiff in its brief relies upon this interpretation and insists that the directed verdict in its favor was justified on the basis of this interpretation of *Fortner* by the Fourth Circuit. As we read the majority opinion in *Fortner*, the holding was that a tying arrangement achieves an unlawful restraint when "the seller can exert some power over some of the buyers in the market." The majority opinion did not hold that the acceptance of the tie-in by customers without more is proof of economic power. If the majority had intended to indicate that acceptance of a tie-in by an appreciable number of customers is sufficient proof of the requisite economic power, it would have been sufficient for Mr. Justice Black to have said so and thus to avoid the exhaustive treatment which he gave to the question of economic power in the tying product set forth in other portions of his opinion.

The judgment of the district court insofar as it sustained the plaintiff's motion for a directed verdict is accordingly reversed, and the action is remanded to the district court

for trial before a jury on the question of liability under Secs. 1 and 2 of the Sherman Act. The judgment is affirmed insofar as it denied the defendants' motion for a directed verdict.[4]

---

4. We have not undertaken in this opinion to discuss all of the items of evidence bearing upon the question of economic power. Plaintiff relies heavily, for example, upon evidence tending to indicate that the Credit Corporation was both able and willing to lend to high risk borrowers at a rate of interest commensurate with a much lower level of risk, i.e., to offer credit on terms otherwise unavailable at the time. The guarantees and the Credit Corporation's relationship to U. S. Steel are pointed to as possible sources of leverage. Upon remand, these items and the entire range of evidence bearing upon this issue should be submitted to the jury. Insofar as the complaints allege a per se violation due to a tie-in, assuming that the evidence developed is substantially the same as that offered at the first trial, the trial judge may appropriately instruct the jury that the tie-in itself has been established as a matter of law, and that the amount of commerce affected is "not insubstantial." On this aspect of the case, the issue for the jury is whether the Credit Corporation, in the language of *Northern Pacific Railway Co., et al.* v. *United States, supra,* had "sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product * * *." Admittedly this is a standard which must vary in application from case to case, but the jury should be free to determine the issue on the basis of the entire evidence (some of which we have commented upon), free from the limitations of an arbitrary definition.